

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

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UNITED STATES OF AMERICA, :

Plaintiff, : Criminal Action No.

v. : 1:16-cr-10094-LTS

ROSS MCLELLAN, :

Defendant. :

----- x

BEFORE THE HONORABLE LEO T. SOROKIN, DISTRICT JUDGE

JURY TRIAL  
Day 11

Tuesday, June 19, 2018  
8:34 a.m.

John J. Moakley United States Courthouse  
Courtroom No. 13  
One Courthouse Way  
Boston, Massachusetts

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**P R O C E E D I N G S**

(In open court.)

THE DEPUTY CLERK: The United States District Court for the District of Massachusetts is now in session, the Honorable Leo T. Sorokin presiding.

Today is June 19th, the case of United States vs. McLellan, criminal action 16-10094 will now appear before this court.

THE COURT: I see all counsel and Mr. McLellan.

All right. Any issues to discuss?

MR. FRANK: We have a couple of issues, Your Honor. One is, in doing some additional work last night on the stipulation issue, we came across US vs. Pratt, 568 F. 3d 11, which is a First Circuit case. And that case provides that in the First Circuit's view, there is a settled rule that the content of a stipulation must be published to the jury prior to the close of evidence. There is language -- there is one sentence in the decision which says -- suggests that the parties can agree otherwise. And it specifically says ordinarily --

THE COURT: What's the issue? You haven't finished the stipulation?

MR. FRANK: I'm sorry?

THE COURT: What's the issue? You haven't finished the stipulation? Is that --

1 MR. FRANK: My concern is, Your Honor, that our  
2 discussion yesterday was about presenting the stipulation to  
3 the jury as part of the Court's instructions.

4 THE COURT: Oh, I see.

5 MR. FRANK: And so this decision has language  
6 suggesting that the parties could agree otherwise. It says  
7 ordinarily, unless there is a contrary agreement between the  
8 parties, district courts should ensure that a stipulation or  
9 the content thereof is presented to the jurors prior to the  
10 close evidence. So it does suggest that there could be a  
11 contrary agreement between the parties.

12 But then there's contrary language in the opinion,  
13 including the sentence I just read a moment ago and a  
14 footnote which says, "Our holding is simply a reminder to the  
15 trial Courts of some well established propositions, namely  
16 that stipulations are evidence, jury instructions are not,  
17 and a stipulation should be presented to the jury in whatever  
18 manner the parties and Courts agree prior to the close of  
19 evidence."

20 So our concern is that we not have an issue --

21 THE COURT: Before that case, or putting aside that  
22 case, exactly where were you on this issue? Like what had  
23 been resolved among yourselves before the potential wrinkle  
24 posed by that case?

25 MR. FRANK: Well, I reviewed the transcript from

1 yesterday and the transcript says -- I said, "If the Court  
2 instructs the jury that there is no dispute, and therefore,  
3 they have to find that to be proved, that element that State  
4 Street was a financial institution and was affected, no  
5 dispute there."

6 Mr. Weinberg said, "I think that's the way to do  
7 it."

8 And then he said, "but do it as part of the Court's  
9 instructions."

10 THE COURT: So have you two had any further  
11 discussions since we had that conversation in Court?

12 MR. WEINBERG: No, Mr. Frank was kind enough to  
13 send me references to the case. I sent him back references  
14 to the part of the case that supports, like most other  
15 things, that the parties can agree, that Mr. McLellan can  
16 waive, and that this can be done consistent with our  
17 understanding of yesterday as part of the instructions.

18 THE COURT: So what you're proposing is I simply  
19 say words to the effect, in the instructions, there's --  
20 let's just say, for sake of discussions, six elements to that  
21 offense. Element number 6 is that the financial institution  
22 to which State Street suffered a loss, the Government has to  
23 prove beyond a reasonable doubt that they suffered a loss or  
24 risk of loss that affected the financial institution, in this  
25 case State Street. The parties agree and I direct you to

1 find that this element is satisfied. Or something like that.

2 MR. WEINBERG: The way I'd like it presented and I  
3 think it's fair to present, is that if the other elements are  
4 proven beyond a reasonable doubt, this element is agreed to  
5 by stipulation.

6 MR. FRANK: Okay. Well, that's a slightly  
7 different presentation of what I understood us to have agreed  
8 to yesterday.

9 MR. WEINBERG: Well, it's implicit, that you've got  
10 to find every element beyond a reasonable doubt and this --

11 THE COURT: Well, they certainly couldn't find Mr.  
12 McLellan guilty unless they also found the others. But why  
13 not -- what I thought we discussed is simply what I just  
14 recited, that -- you know, that this is what the element is,  
15 I'd say it in a sentence, or a phrase and then that the --  
16 something like -- and these aren't exact words, but the  
17 parties agree that this is -- this element, the Government  
18 has met its burden on this element, and you're instructed to  
19 find that element. And --

20 MR. WEINBERG: I mean, my point is that  
21 essentially -- and the reason why I asked for it to be in the  
22 context of the general instruction.

23 THE COURT: I'm happy to remind them that that --

24 MR. WEINBERG: I'm not agreeing that State Street  
25 was affected. I'm agreeing that if there was a proven AXA

1 fraud that involved Mr. McLellan, then they were affected for  
2 purposes of the statute. In other words, that's not a  
3 disputed element.

4 MR. FRANK: So then I think we don't have an  
5 agreement, Your Honor.

6 THE COURT: How would that have an effect? What  
7 would be the significance of that? Is that preserving your  
8 rights for other cases or this case?

9 MR. WEINBERG: No, in this case. It's in the  
10 context of a -- you know, it's in the context of -- State  
11 Street is not affected by AXA, unless there's an overcharge,  
12 unless there's a criminal overcharge. Then it's affected.  
13 I'm not disputing, in other words, that banks get affected by  
14 actions of employees and that State Street would be affected  
15 by the AXA transaction, if there was a fraud, if there was --  
16 if the Government proved beyond a reasonable doubt what  
17 they've charged. I would never -- the predicate is they have  
18 to prove the other elements. Now, Your Honor --

19 THE COURT: Given. No one is arguing that they  
20 don't have to prove the other elements in order to convict  
21 Mr. McLellan.

22 MR. WEINBERG: So Your Honor would -- I assume,  
23 would be saying to the jury, these are the elements of  
24 Count 6, assuming that Your Honor denies a Rule 29, which I  
25 hope will not occur and I want to address that at the



1 conclusion.

2 THE COURT: Sure. All of this predicate -- without  
3 prejudice to your Rule 29 motion.

4 MR. WEINBERG: But assuming that it goes to the  
5 jury, Your Honor is going to have a set of elements, five of  
6 the elements are in dispute. The Government needs to prove  
7 them beyond a reasonable doubt, the sixth one is not in  
8 dispute. The parties stipulate that State Street, with  
9 their -- this offense, State Street would be affected and  
10 State Street is a financial institution. I mean, they're not  
11 affected in a vacuum, they're affected by the conduct that  
12 the Government has charged.

13 MR. FRANK: Your Honor, we don't have an agreement  
14 if that's -- that's not what I understood yesterday. What  
15 the transcript says, what Mr. Weinberg said yesterday  
16 was, "The Court can instruct the jury" --

17 THE COURT: I'm not holding either of you to the  
18 transcript. I'm just trying to figure out if you have an  
19 agreement. In other words, if you tell me today you don't  
20 want to have an agreement, I'm not pulling out the transcript  
21 and saying you said. And likewise, I'm not saying --

22 The question just is a practical one. Do you have  
23 an agreement as to resolution of this or not? Because what I  
24 understand Mr. Weinberg to be saying now is simply what -- is  
25 the instruction is likely to read something like this. This

1 might come as a great surprise to all of you.

2 The Government bears the burden of proof beyond a  
3 reasonable doubt on Count 6 to prove the following elements:  
4 One, and I'll say what element number one is. Two, and I'll  
5 say what element number two is, three, four, however many it  
6 divides out. I don't remember at the moment. The last one  
7 being the -- the loss affected element.

8 And then I'm only doing this if you both agree, but  
9 if you both agree, I'm -- subject to thinking about *Pratt* --  
10 well, we'll come back to *Pratt*. I haven't thought about  
11 *Pratt* before I walked out. But I would be saying that, you  
12 know, as to -- then as to number 6 --

13 And then there'd be further explanation below that  
14 explaining those things in the elements that require  
15 explanation and either in element 6 or further below, and  
16 explaining element 6, I would say something like the parties  
17 agree that element 6 is satisfied and the Government has met  
18 its burden of proof on that. And that doesn't -- and maybe  
19 for clarity, if it were necessary, if you want me to say it  
20 is -- just that this has no effect. That you have to make an  
21 independent determination on the other five elements. That's  
22 obvious and something like that.

23 If that's agreeable to both of you, or with some  
24 tweak agreeable to both of you, then the question is, does  
25 *Pratt* pose an obstacle to that.

1 MR. WEINBERG: That is agreeable in that context,  
2 Your Honor. I just -- you know, the reason why it was  
3 important to me that it be in the context of the instructions  
4 is I don't want to have the Government stand in front of this  
5 jury, without the other elements, and say Mr. Weinberg and  
6 Mr. McLellan agree that State Street was affected by the AXA  
7 fraud. That's why I wouldn't stipulate to the evidence,  
8 which I consider very prejudicial. I don't want to go back  
9 to the -- debate the Court's evidentiary decision.

10 THE COURT: Two questions for you, Mr. -- one is a  
11 stipulation along the lines that I just described agreeable  
12 to you. And two, if it is, then we should talk about what's  
13 the implications of *Pratt*.

14 MR. FRANK: A stipulation is, in concept, agreeable  
15 to us, but it depends on the precise language of the  
16 stipulation.

17 THE COURT: So what I suggest is this: It sounds  
18 like, in principle, you both agree to something along the  
19 lines of what I've outlined, subject to exactly what it --  
20 how it's written. What I would propose -- what I'm -- why  
21 isn't it -- you both agree on what the language of the  
22 element is, as quoted from the statute. Why not just say  
23 element, whatever number it becomes, element number, call it  
24 six, is quoting the statute -- I don't have the language in  
25 front of me, but whatever that statutory language is, that

1 about which there is no dispute, I think, between you about  
2 what the statute says.

3 And that the Government and Mr. McLellan agree  
4 that -- that this element, the Government has met its burden  
5 of proof, or this element is satisfied, or the Government has  
6 met its burden of proof on this element, and that you are  
7 instructed to find this element satisfied. And that -- but  
8 you must, nonetheless, consider -- you know, you make an  
9 independent determination on all the other elements and  
10 there's no agreement as to any other elements. And that --  
11 or -- something like that. I mean --

12 MR. FRANK: That's acceptable to us in concept.  
13 What I was objecting to was Mr. Weinberg's suggestion that to  
14 find that there was a condition, that they had to find a  
15 fraud before they found that element, and that's not what I  
16 understand or --

17 THE COURT: Right. No, I understand. If I say  
18 that or --

19 MR. WEINBERG: That's fine.

20 THE COURT: That's acceptable to both of you?

21 MR. WEINBERG: That's acceptable and Mr. McLellan  
22 is here listening to the debate. There's not going to be a  
23 dispute if the stipulation in this case is incorporated into  
24 the instructions as discussed.

25 THE COURT: You've discussed this with him and he's

1 agreeable?

2 MR. WEINBERG: Yes.

3 THE COURT: All right. So then the question is the  
4 *Pratt* issue.

5 MR. FRANK: So Your Honor, I think with respect to  
6 the *Pratt* issue, we would suggest a way around that would be  
7 a colloquy with the defendant, where he explicitly  
8 understands the issues, and waives any right --

9 THE COURT: Understands his right to the jury trial  
10 on that issue and waives that, essentially.

11 MR. FRANK: And -- yes, and understands that we are  
12 deviating from the standard practice of presenting the  
13 evidence to the jury during the course of the case and  
14 presenting this to them as a *fait accompli* during the jury  
15 instructions.

16 MR. WEINBERG: To be clear, so the record is  
17 crystal clear, I am advising Mr. McLellan, as a matter of  
18 strategy, that it is in his interest to have the stipulation  
19 incorporated into the instructions that will also list the  
20 other disputed elements at the same time. And, therefore, we  
21 request an exception to *Pratt* and that the stipulation be  
22 read to the jury as part of the instructions.

23 THE COURT: All right. How about I ask -- you  
24 object, or tell me to pause -- like two questions to ask Mr.  
25 McLellan.

1 MR. WEINBERG: Sure.

2 THE COURT: So Mr. McLellan, you've heard this  
3 discussion we've just been having about this issue about the  
4 loss affecting a financial institution element of Count 6?

5 MR. MCLELLAN: Yes, Your Honor.

6 THE COURT: All right. Have you had a full and  
7 fair opportunity to discuss it with your lawyers?

8 MR. MCLELLAN: Yes, Your Honor.

9 THE COURT: All right. Are you satisfied with the  
10 advice and representation, as to this issue, they've given  
11 you?

12 MR. MCLELLAN: Yes, Your Honor.

13 THE COURT: All right. And do you agree, or do you  
14 join in the decision to not present this element to the jury,  
15 but tell the -- instruct the jury that it's satisfied as a  
16 matter of law, by virtue of an agreement?

17 MR. MCLELLAN: Yes, Your Honor.

18 THE COURT: All right. Any other questions?

19 MR. FRANK: I think, just to be clear, that that  
20 instruction will come during jury instructions and after the  
21 close of evidence.

22 THE COURT: Right. And that this will -- as part  
23 of my jury instructions, which come after the close of all  
24 the evidence and after the final arguments, closing arguments  
25 by all the lawyers in the case.

1 MR. MCLELLAN: Understood.

2 THE COURT: All right. And that's all fine with  
3 you?

4 MR. MCLELLAN: Yes, sir.

5 MR. WEINBERG: And may I respectfully, because I'm  
6 always hesitant not to make the objections at the appropriate  
7 time, renew my statement that this stipulation is a result of  
8 my -- of the Court's overruling my objection to the  
9 Government's proffer that it wanted Mr. Shaw to testify to  
10 the --

11 THE COURT: Your evidentiary objection to what the  
12 testimony was that I allowed in is preserved.

13 MR. WEINBERG: Thank you, sir.

14 THE COURT: All right. Fine.

15 Thank you, Mr. McLellan.

16 All right. So my suggestion, just in terms of  
17 the -- maybe, Rachel, you can give me -- e-mail me the little  
18 portion that I read to them that they both agreed to about  
19 the instruction.

20 And then I'll incorporate that in the jury  
21 instructions, the draft that I give you, so you can both look  
22 at that.

23 All right. Any other issues for today?

24 MR. JOHNSTON: Your Honor, there's a matter of  
25 making sure the record reflects which exhibits have been

1 admitted. There's -- after going through the transcript,  
2 there may be like two exhibits that show up in the record as  
3 a different number than they actually are --

4 THE COURT: Okay.

5 MR. JOHNSTON: So we're going to take a moment and  
6 go compare.

7 THE COURT: My suggestion, just as a general  
8 matter, in -- to the extent there's a worry about this, the  
9 presumptive record of what's in and out is Ms. Simeone's  
10 list. If there's a dispute or ambiguity -- if one of you  
11 raises a dispute or ambiguity, if you think something is in  
12 that's not on her list, you think something is out that she  
13 has in, then the final word is to go look at the transcript.  
14 So if you have some -- so I would suggest looking at the --  
15 if you haven't already done it, looking at her list, too.  
16 But that's fine. If there's two that you think came in under  
17 one number and they are a different number, we can clarify  
18 that and that's fine.

19 All right. Anything else?

20 MR. FRANK: Not for the Government, Your Honor.

21 MR. WEINBERG: Just at the conclusion of the  
22 Government's witness, when the Government rests, we'd like a  
23 short break to at least preserve certain issues.

24 THE COURT: Fine. We'll take a five-minute break.

25 MR. WEINBERG: Thank you.



1 THE COURT: Okay. All right. I don't have --

2 MR. WEINBERG: There's one other issue, again, for  
3 the abundance of caution. We again renew our motion to  
4 exclude Mr. O'Callaghan. He's the representative of NTMA.  
5 NTMA has refused to provide any documents, despite the  
6 letters rogatory they were issued by the US District Court in  
7 Massachusetts.

8 They have, instead, advised that they would only  
9 produce it, pursuant, essentially, to a request by one  
10 central prosecutor to the Irish central prosecutor, which the  
11 Government has declined to do. We have, therefore, been  
12 denied our right to access records that are in the exclusive  
13 control of the Government, meaning they could have, but chose  
14 not to seek them by the MLAT.

15 We are denied the ammunition, if you will, the  
16 materials that we would ordinarily be provided for the  
17 purposes of cross-examining Mr. O'Callagahn. I believe he  
18 should not be provided the forum in this court to be a  
19 witness, when he has refused to produce documents that, were  
20 he a United States witness, would have been required to be  
21 produced, pursuant to Rule 17(c).

22 I believe that the Government could have rectified  
23 that circumstance. They chose not to. I understand the  
24 Court made a legal ruling saying the Court did not believe it  
25 should or could exercise its authority to order the

1 Government to use its treaty powers. But one of the  
2 sanctions available to the Court is to exclude the witness  
3 who represents the party that has consistently refused to  
4 produce even one page of its business records, pursuant to  
5 the letters rogatory.

6 We have gotten certain information from State  
7 Street, that the Government has provided, having received it  
8 from State Street, via the FCA. But we have a right, I  
9 believe, under the Sixth Amendment, to have a witness that's  
10 going to come to court and testify in a criminal trial  
11 against a citizen, produce evidence, and they shouldn't be  
12 allowed to come here and testify in a context where we're  
13 denied the materials that we would ordinarily have and that  
14 we find necessary for the purpose of indicating our Sixth  
15 Amendment right to cross-examine and our Sixth Amendment  
16 right to produce evidence.

17 MR. FRANK: Your Honor, just to make sure that the  
18 record is abundantly clear on this point. First of all,  
19 there are no materials related to NTMA that are in the  
20 possession, custody or control of the United States, that  
21 have not been turned over to the defense. None.

22 Everything has been turned over to the defense  
23 that's in our possession, custody, or control. Materials  
24 that we may or may not be able to obtain by MLAT are not  
25 materials that are in our possession, custody and control.

1 And we've been advised by the Office of International Affairs  
2 that an MLAT does not allow us to obtain -- to seek materials  
3 from a foreign Government on behalf of the defense as a  
4 matter of treaty.

5 Second, it is not true that the defense has not  
6 received any materials from the files of NTMA, beyond those  
7 provided by State Street. In fact, NTMA filed a report with  
8 the City of London Police, pursuant to that agency's  
9 investigation. It turned over extensive documents to the  
10 City of London Police, pursuant to that agency's  
11 investigation, including internal memoranda, handwritten  
12 notes of this witness about meetings he had with State Street  
13 representatives and other documents. Those materials were  
14 turned over to the defense as part of the Government's  
15 discovery production in this case. So there are internal  
16 records that are available to the defense, of NTMA, that have  
17 been produced beyond those made available by State Street.

18 Third, the defense actually had been in discussions  
19 with the NTMA regarding a deposition of this witness  
20 approximately a year ago and the witness had agreed to sit  
21 for a deposition with the defense. Then there arose  
22 additional issues when the defense sought additional  
23 documents, pursuant to letters rogatory from the NTMA and at  
24 that point the agreement broke down. But there was an  
25 agreement, prior to the defense pursuing the letters rogatory

1 process, for this witness to sit for a deposition in the  
2 parallel civil proceedings, and he was prepared to do so at  
3 that time.

4 MR. WEINBERG: So to answer that, going backwards,  
5 yes. We moved to depose him. Yes, for a preliminary period,  
6 Mr. O'Callghan had agreed through counsel to the deposition.  
7 When we thereafter moved for documents that would have  
8 enhanced the trial in the criminal process, Mr. O'Callaghan  
9 refused to produce documents and refused to do a deposition,  
10 unless we withdrew, essentially, our request for a  
11 deposition. Maybe he would have gone back and allowed the  
12 deposition then, but he certainly said to us through counsel  
13 that if you want documents, I'm not being deposed. I don't  
14 think that's a basis to interfere with my objection.

15 Second, Mr. Goldstein advises that there are  
16 some --

17 (Counsel confers.)

18 MR. WEINBERG: Mr. Goldstein advises that there is  
19 a limited set of documents received from the City of London  
20 Police. This has been his witness, so it wasn't on the  
21 forefront of my brain. But it is -- they were all dated, I'm  
22 advised, after the investigation, rather than being the  
23 contemporaneous records of NTMA.

24 (C), they're a small subset of what would be the  
25 ordinary business records of NTMA. We have repeatedly asked,

1 and I believe Mr. Frank, in fairness to him, has asked NTMA  
2 to produce it.

3 But (d), this Court's decisions and its decisions  
4 about constitutional rights are not dependent on what  
5 somebody in Washington tells Mr. Frank is the position of the  
6 Department of Justice. This would --

7 Last, is that if their position -- if the way it's  
8 presented to the Department of Justice is the defense wants  
9 us to go get documents, that's not really a completely fair  
10 description of what is required. The Court issued letters  
11 rogatory. What we asked -- the Government to do is to  
12 provide documents that would expand the reliability of the  
13 truth-telling function as to the NTMA allegations. It's not  
14 that I wanted just impeachment documents. I wanted the  
15 documents to define the transition that the Government is  
16 trying to criminalize.

17 MR. FRANK: Just one last --

18 THE COURT: I think -- just a couple of  
19 observations. One, the request, at this time, to exclude the  
20 Government's witness is denied. I overrule the objection.

21 That said, I think I've noted this before, but  
22 whenever there's a -- that one of the founding principles of  
23 our criminal justice system is the defendant's power -- a  
24 defendant's right to invoke the Court's power to subpoena  
25 witnesses and documents to come to court. That's a

1 foundational principle that was enshrined in the Bill of  
2 Rights at the founding of our country. It's one of the  
3 essential tools that helps assure the fairness of trials and  
4 the truth-finding function. And it is --

5 It does raise -- I think I've said this before.  
6 There is a concern raised whenever you have a witness who is  
7 not subject, or potential witness, to that power or a set of  
8 documents or what have you. Here we have -- certainly this  
9 witness appears not subject to that power, at least with  
10 respect to defense. But any -- but at the moment, I am -- I  
11 decline to exclude the witness and we'll assess further, if  
12 further motions are made, if and when it's relevant.

13 MR. WEINBERG: Well, I would make a motion for the  
14 Court to give the jury an adverse inference instruction, at  
15 this time, when this witness testifies.

16 THE COURT: So that I'm not allowing or denying.  
17 I'm just -- that's a request for jury instruction. I will  
18 consider that. I'll give you both a chance to address it and  
19 talk about it. And I will -- I don't know what my view of  
20 that is. I haven't thought about that. But I don't think  
21 now, we have to hash that out now. That's not affected by --  
22 that's a jury instruction question, rather than a witness  
23 question.

24 MR. WEINBERG: I'm actually hoping for it twice.  
25 Once when the witness testifies and once during jury

1 instructions, but we have an instruction that we'll provide  
2 to the Court during the break.

3 THE COURT: All right.

4 MR. FRANK: Just to be clear, Your Honor, there  
5 were -- and for the record, there were documents that the  
6 defense obtained for each of the other -- or for many of the  
7 other victim witnesses and they used exactly one of those  
8 documents in the cross-examination of one witness. So the  
9 notion that there is some trove of documents that would be  
10 helpful to the defense, for this particular witness, when  
11 there were none for any of the other witnesses --

12 THE COURT: Pause one second.

13 Maria, is the jury here?

14 THE DEPUTY CLERK: I have to go check.

15 THE COURT: Okay. We'll see if we have everyone.

16 MR. WEINBERG: The truth is that we reviewed the  
17 documents, that we used them to formulate questions and  
18 decide what not to ask. And for instance, we would be  
19 getting from the NTMA the other proposals we used with AXA,  
20 the JP Morgan proposal, of 4.2 million, which was triple what  
21 AXA got charged and six times what -- or nine times what the  
22 Government claims they should have been charged.

23 We expect that NTMA, too, got proposals. We know  
24 they split the transition with Nomura and we very much wanted  
25 to see those proposals to be able to use them in the

1 cross-examination of Mr. O'Callaghan.

2 MR. FRANK: Those documents would have been equally  
3 available to the defense from other sources, such as Nomura.

4 MR. WEINBERG: Yes. And we used the letters  
5 rogatory to try to get them from Nomura and Goldman Sachs.  
6 Goldman Sachs never produced them and Nomura is producing  
7 documents in a serial way starting about two or three days  
8 ago. So --

9 MR. FRANK: Goldman Sachs is not relevant to this  
10 witness and counsel has just represented that he obtained  
11 documents from Nomura and that Nomura voluntarily agreed to  
12 produce those documents.

13 MR. WEINBERG: As to the KIA transition. We have  
14 not certainly accessed the documents we want that  
15 Mr. O'Callaghan could have produced. In the middle of this  
16 trial, we're getting dumps of documents from Nomura and --

17 MR. FRANK: Perhaps counsel could make clear when  
18 he asked Nomura for those documents.

19 MR. WEINBERG: When I asked Nomura for the  
20 documents is the same day that the letters -- within weeks of  
21 the letters rogatory, when we hired British counsel, Nomura  
22 was one of the nine letters rogatory issued to Great  
23 Britain --

24 MR. FRANK: And how long after the --

25 MR. WEINBERG: And we've been pushing for months



1 and months and months and months --

2 THE COURT: You know what? If you guys want to  
3 have a conversation, you're free to have a conversation  
4 whenever you want and you can ask, Mr. Frank, whatever  
5 questions of Mr. Weinberg you wish to ask.

6 MR. WEINBERG: Sorry, Your Honor.

7 THE COURT: And since he's not under subpoena, he  
8 can choose to answer them or not, as he wishes.

9 MR. GOLDSTEIN: Could we have a few minutes, Your  
10 Honor, or no?

11 THE COURT: What did you say?

12 MR. GOLDSTEIN: Could we have a few minutes?

13 THE COURT: To go to the men's room?

14 MR. GOLDSTEIN: Yeah.

15 THE COURT: You have time to go.

16 (The jury enters the courtroom.)

17 THE COURT: Good morning, ladies and gentlemen.  
18 Nobody did any independent research, discussed the case with  
19 anybody? Good. All right, so we resume with the  
20 Government's case this morning.

21 Next witness, Mr. Frank.

22 MR. FRANK: Thank you, Your Honor. The Government  
23 calls Eugene O'Callaghan.

24 (The witness was duly sworn.)

25 THE COURT: Go ahead, Mr. Frank.

1 MR. FRANK: Thank you, Your Honor.

2 **EUGENE O'CALLAGHAN**

3 having been duly sworn, testified as follows:

4 **DIRECT EXAMINATION BY COUNSEL FOR PLAINTIFF**

5 BY MR. FRANK:

6 **Q.** Good morning, Mr. O'Callaghan.

7 **A.** Good morning.

8 **Q.** Could you state and spell your name for us, please?

9 **A.** My name is Eugene O'Callaghan, E-u-g-e-n-e,  
10 O-C-a-l-l-a-g-h-a-n.

11 **Q.** And where do you live, sir?

12 **A.** I live in Dublin, in Ireland.

13 **Q.** And where do you work?

14 **A.** I work in the National Treasury Management Agency in  
15 Dublin.

16 **Q.** What is the National Treasury Management Agency?

17 **A.** It is an agency of Government which manages assets and  
18 liabilities on behalf of the Government.

19 **Q.** It's often referred to as the NTMA?

20 **A.** That's correct.

21 **Q.** What do you do at the NTMA?

22 **A.** I am the director of the Ireland Strategic Investment  
23 Fund. That's the head of the fund and the Ireland Strategic  
24 Investment Fund is the Ireland Sovereign Wealth Fund.

25 **Q.** And in the period of 2010 to 2011, was that fund known by

1 a different name?

2 **A.** Yes. It was previously the National Pensions Reserve  
3 Fund and then the Ireland Strategic Investment Fund is the  
4 successor fund to the National Pensions Reserve Fund.

5 **Q.** And what purpose did the National Pensions Reserve Fund  
6 serve?

7 **A.** The purpose of the National Pensions Reserve Fund to  
8 build up a pool of assets, which would be used as a means of  
9 part payment of pensions, both public sector worker pensions,  
10 and social welfare, social security-type pensions, between  
11 the years 2025 and 2055. So it was a long-term investment  
12 fund.

13 **Q.** And how large, approximately, was the fund in 2010 or  
14 2011?

15 **A.** So it got to a maximum of about 23 billion euros or 24  
16 billion euros. I think that was in about 2009. And then was  
17 used -- a large portion of the fund was used to recapitalize,  
18 to pay out the Irish banks in the financial crisis. So I  
19 think in 2010 or 2011, it may have been about 16 billion  
20 euros.

21 **Q.** How long have you worked at the NTMA?

22 **A.** Since 2005. So that's over 13 years.

23 **Q.** And what did you do previously?

24 **A.** Previously I worked and I was an executive director and  
25 chief operating officer of Irish Life Investment Managers,

1 which is Ireland's largest investment management business.

2 **Q.** And what did you do before that?

3 **A.** Before that I worked in corporate finance for a year with  
4 KPMG and before that I worked in New Zealand in an investment  
5 bank and I started my career as a chartered accountant at  
6 KPMG in Dublin.

7 **Q.** And briefly, what's your educational background?

8 **A.** I have a commerce degree from the University College  
9 Dublin.

10 **Q.** Does NTMA manage its own money, or does it outsource to  
11 professional money managers?

12 **A.** Almost entirely outsourced. So the NPRF at the time had  
13 a manager of managers' model, where all of the asset  
14 management was outsourced, small amounts of cash might have  
15 been managed internally.

16 **Q.** Did there come a time in about late 2010 or early 2011,  
17 when the NTMA decided to sell a large portfolio of stocks and  
18 bonds?

19 **A.** Yes. That came about in late 2010, when the Irish  
20 economy, following the financial crisis, and what -- got into  
21 severe difficulty and Ireland as a country entered into a  
22 program of financial support, which was what was known as the  
23 Troika, which was the International Monetary Fund, the IMF,  
24 the European Union, and the European Central Bank. And that  
25 was -- that program of financial support was 85 billion euros

1 and 17 billion euros, approximately, of that 85 was to be  
2 provided by Ireland. And of that 17, 10 billion was to come  
3 from the assets of the National Pension Reserve Fund.

4 **Q.** So what was that money going to be for?

5 **A.** That was used -- that was money that was used -- the 85  
6 billion, you mean?

7 **Q.** The 10 billion.

8 **A.** Oh, the 10 billion was invested in equities, mainly  
9 equities around the world and those equities were going to be  
10 realized, sold, so that the money could be used by the Irish  
11 Government to bail out the two Irish banks, which had got  
12 into severe difficulty, the two main banks.

13 **Q.** So you were selling off pension funds to bail out the  
14 banks?

15 **A.** Correct.

16 **Q.** And it was approximately 10 billion euros?

17 **A.** 10 billion euros of our assets were sold off, yes.

18 **Q.** And that was approximately half of the -- a little less  
19 than half of what was at the fund at that time?

20 **A.** It was a little more than half, at the time, because some  
21 money of the fund from the 23 billion had been used in 2009  
22 to inject some capital into the banks prior to that.

23 **Q.** And you testified that they were primarily stocks and  
24 some bonds from around the world?

25 **A.** That's correct.

1     **Q.** What, if any, US securities were involved?

2     **A.** So there were very significant elements of -- elements of  
3     the portfolio, were US securities. From memory, it was over  
4     30 percent of the assets were US equities.

5     **Q.** Equities traded on US exchanges?

6     **A.** Correct.

7     **Q.** Did there come a time when you decided to hire someone to  
8     assist you with that transition?

9     **A.** Yes, so we had a transition manager panel in place since  
10    the year 2007, so transition managers assisted us in large  
11    portfolio movements. You know, in executing large portfolio  
12    movements. This would have been a very, very substantial  
13    transaction. So we had a panel in place, which comprised  
14    three banks. State Street, Nomura, and Citibank, and we  
15    issued a tender to each of those, a tender request for each  
16    of those to tender for the execution of the sale of the 10  
17    billion.

18    **Q.** And a tender is what?

19    **A.** It's a -- it's a pitch, if you like, where we ask  
20    questions, which help us to assess which is likely -- which  
21    of the members of the panel is likely to do the best job for  
22    us. And so we ask questions which are responded to in fairly  
23    detailed written form. And ultimately we assess those  
24    answers against predefined criteria in order to select, you  
25    know, how we go -- our course of action.

1     **Q.** You mentioned three banks; Citibank, Nomura, and State  
2     Street?

3     **A.** They were the three.

4     **Q.** And you worked with each of those banks before?

5     **A.** Yes, we had. So this was transition number 14 on -- for  
6     the panel that had been put in place since 2007 and we had  
7     worked with all of them, you know, during -- from numbers 1  
8     to 13, all of the -- of those three banks had executed some  
9     transitions for us.

10    **Q.** Who were your contacts at State Street?

11    **A.** My main contact was Ed Pennings, who was the head of the  
12    transition management activity in London, and Cassie Waller  
13    was the client relationship manager. We worked out with her  
14    quite a lot, too.

15    **Q.** Did you know the defendant, Ross McLellan?

16    **A.** I knew of Ross McLellan and he was the head of the  
17    transition group, but I don't recall meeting him and there  
18    would have been no interaction on the transactions.

19    **Q.** How did you decide which of the banks to hire?

20    **A.** We went through an evaluation process. This evaluation  
21    process was -- had to be consistent with EU, European Union  
22    procurement rules and procedures. So we comprised -- I  
23    should say established or assembled an evaluation group of  
24    five of the senior executives in the National Pensions  
25    Reserve Fund team; me, the other two most seniors, and two

1 others. And we were joined by a compliance person to make  
2 sure that we -- that the process complied with the  
3 procurement rules.

4 And then we assessed each of the responses against  
5 a number of criteria and essentially scored them. And  
6 ultimately from that scoring process, we selected -- we  
7 decided to split the award between State Street and Nomura.

8 **Q.** What were the factors that you assessed them on?

9 **A.** So the factors would have been -- and they were set out  
10 and each of the tendering banks was aware of these factors.  
11 So number one would have been the team and the experience  
12 that was being brought to bear on this particular transition,  
13 because sometimes people were available or not, so there was  
14 a team and experience being brought to bear.

15 The second one was around the investment strategy  
16 that was proposed, because this was a complex, very large  
17 transaction.

18 And the third one was around implementation  
19 shortfall, which is the -- sort of the industry standard  
20 mechanism for calculation the all-in cost of the transition,  
21 so each of the tenders provided us with an estimate of what  
22 the implementation shortfall would be. The forth aspect was  
23 fees and charges that would have been earned by the  
24 transition manager and there was also a -- an element  
25 attaching if there had been any material recent changes



1 within the organization that we needed to take account of.

2 So we scored each of the responses against those  
3 criteria.

4 **Q.** If we could take a look at Exhibit 70-1 -- or 70.1, in  
5 evidence, please.

6 And Mr. O'Callaghan, do you recognize this proposal  
7 that was submitted by State Street to the NTMA in connection  
8 with NTMA transition number 14?

9 **A.** Yes.

10 **Q.** Could we look at page 6, please.

11 MR. FRANK: And Erin, if you can just blow up the  
12 top two paragraphs under "Equity."

13 BY MR. FRANK:

14 **Q.** And again, this was primarily an equity or stock  
15 transition?

16 **A.** Yes, absolutely.

17 **Q.** If you look at the first two sentences of that paragraph,  
18 it says, "State Street is entirely focused on serving the  
19 needs of our clients. We assure clients we act in their best  
20 interest by aligning our interest with theirs."

21 Do you see that?

22 **A.** Yes.

23 **Q.** What was your understanding of what that meant?

24 **A.** That absolutely, that State Street would always act in  
25 our best interest, and that our interests would be what drove

1 all of the activity, and that their interest would be the  
2 same as our interests, and that there would never be any  
3 differences.

4 **Q.** If you could look at the next sentence, it says, "In our  
5 fiduciary role, we always act as agent to the client."

6 What did you understand State Street to be telling  
7 you when they referred to their fiduciary role?

8 **MR. GOLDSTEIN:** I just object, Your Honor, for the  
9 record. Asking him his understanding of these documents.  
10 The documents stand for themselves.

11 **THE COURT:** Overruled.

12 **THE WITNESS:** And fiduciary, I am -- to me, means  
13 acting in a position of trust and acting in a position of  
14 good faith, on behalf of the beneficiary of the service. And  
15 acting as agent is acting in a manner carrying out the  
16 activity as if -- as if, in our place. So as if it was us  
17 executing the transactions in the marketplace. So  
18 essentially, trust and good faith, and acting as if they were  
19 us. And, therefore, acting totally in our interest.

20 **MR. GOLDSTEIN:** I would just ask for an instruction  
21 that it's his understanding, Your Honor. It's not -- it's  
22 not an interpretation.

23 **THE COURT:** That's the witness understanding.

24 **MR. GOLDSTEIN:** Thank you.

25 **THE COURT:** As to what the document meant to him

1       when he reviewed it.

2                       Go ahead.

3       BY MR. FRANK:

4       **Q.**   To be clear, Your Honor -- I mean, to be clear,  
5       Mr. O'Callaghan, these are not your words, correct?

6       **A.**   They are not my words.   No.

7       **Q.**   They are State Street's?

8       **A.**   They are.   Absolutely.

9       **Q.**   Let's look at page 8, please.   Do you see where it  
10       says "fixed income" in the middle of the page there?   You see  
11       that the heading is "fixed income"?

12       **A.**   Yes.

13       **Q.**   And if we go to the second circle, it says "employ an  
14       agency trading strategy to ensure best execution."

15                       What did you understand that to mean?

16       **A.**   So it's the same principles of an agency acting on our  
17       behalf and best execution is a market concept to ensure that  
18       the best price is obtained.   And in the case of sales and the  
19       highest price possible is obtained, you know, at each time  
20       transactions are executed.

21       **Q.**   And who did you understand would get the benefit of that  
22       best price?

23       **A.**   So we and the National Pensions Reserve Fund would get  
24       the benefit of that.

25       **Q.**   Could we look at page 9, please.   Do you see at the top

1 of the page, there's a "fee proposal"?

2 **A.** Yes.

3 **Q.** It says, "As crossing will be the most important tool for  
4 minimizing costs in this transition, we propose to charge  
5 zero commission on all trading activity. We propose to  
6 charge a management fee of 1.25 basis points, 0.0125 percent  
7 on the assets entering the transition. This fee will cover  
8 our cost incurred for the transition and will align our  
9 interest with the NTMA in finding the best natural liquidity  
10 through our unrivalled crossing network."

11 What did you understand that to mean?

12 **A.** So I understood that there would be no commissions  
13 charged on any of the trades where previous transitions that  
14 had been carried out. There would have been a commission  
15 charged. And in place of the commission, in order for State  
16 Street to earn revenue, that there would be a management fee  
17 of 1.25 basis points charged on all the assets that they were  
18 going to sell for us. And that that would be the only cost  
19 that we would incur and the only revenue that State Street  
20 would earn from the transaction.

21 **Q.** If we could look at the table below, do you see that they  
22 presented you with a cost summary, in tabular form, for two  
23 scenarios?

24 **A.** Yup.

25 **Q.** Do you recall that one scenario was selling all the

1 assets at one point in time and one scenario was -- that they  
2 offered you was a phased approach?

3 **A.** Yes, I do, yeah.

4 **Q.** So if we look at this one, if you look at the sentence,  
5 it says, "Scenario one, full liquidation at a single point in  
6 time."

7 Do you see that?

8 **A.** Yes.

9 **Q.** And what does it say under "equity commissions"?

10 **A.** Zero is the equity commission.

11 **Q.** And at the bottom, what does it say under "fixed income  
12 commissions"?

13 **A.** Zero.

14 **Q.** And if we can look at scenario two, do you see that this  
15 reflects three tranches of the equity transition? Do you  
16 understand that to mean three different phases of sales?

17 **A.** Yeah, three phases of the -- broken down into the three  
18 phrases.

19 **Q.** And what does it represent under equity commissions?

20 **A.** Zero.

21 **Q.** And what does it represent under -- well, it doesn't --  
22 yeah, at the bottom, fixed income commissions?

23 **A.** Zero.

24 **Q.** What was your -- well, let me ask you this,  
25 Mr. O'Callaghan. Had you ever, previously, paid for

1 transitions on a flat fee basis?

2 **A.** No, I don't think so.

3 **Q.** Did any of the other contenders for this transition bid  
4 on a flat fee basis?

5 **A.** No, not that -- I don't think so. No.

6 **Q.** They bid on a commission basis?

7 **A.** Yeah.

8 **Q.** What was your understanding of what a flat fee included?

9 **A.** So a flat fee was the all-in cost and was effectively in  
10 place of the commissions, which, you know, under different  
11 charging structure might be charged.

12 **Q.** Was there any significant -- what, if any, significance  
13 was there to you that State Street told you it would act as  
14 your agent and your fiduciary?

15 **A.** That was -- that was vital. And -- for State Street.  
16 And agency was -- you know, the agency model was very much a  
17 part of State Street's proposition to us from 2007. And  
18 fiduciary responsibility is a critical -- fiduciary duty is a  
19 critical element of any activity that we might outsource and  
20 that was absolutely vital.

21 **Q.** Have you heard the term VWAP, V-W-A-P?

22 **A.** I have, yes.

23 **Q.** Did you ask -- well, first of all, what is your  
24 understanding of what that term means?

25 **A.** Volume-weighted average price. And it's a measure of the

1 average price that a security might trade at over the course  
2 of a period, usually a day, and it's a means often used of  
3 assessing trading efficiency or trading skill.

4 **Q.** Did you ask State Street to trade for you in this  
5 transition on a VWAP basis?

6 **A.** No, we didn't. We used implementation shortfall, which  
7 is an alternative method of assessing trading outcomes. That  
8 was our basis for evaluation.

9 **Q.** What did you do after you received this proposal from  
10 State Street?

11 **A.** We had proposals from Nomura and Citibank, also, and --  
12 and we -- as I said, previously we assembled an evaluation  
13 group, including five people, including the three most senior  
14 people in the team. And then we assessed each of the  
15 proposals against each other and against our criteria.

16 **Q.** If we could look at Exhibit 71 in evidence, please.

17 Mr. O'Callaghan, do you see, this is an e-mail  
18 dated December 15, 2010, from Edward Pennings to Killian  
19 Buckley and Cassie Waller, with a copy to you?

20 **A.** Yeah.

21 **Q.** Who is Killian Buckley?

22 **A.** Killian Buckley was a senior analyst working in my team.  
23 He reported to me.

24 **Q.** And if we look at paragraph number one, it says "Your  
25 calculation of 29 basis points for implementation shortfall

1 is correct, as is the SD range. All transactions are  
2 proposed to be done at zero commission, but a management fee  
3 of 1.25 basis points is proposed to be charged. This should  
4 be included in the implementation shortfall to the total cost  
5 number. The management fee not included was an oversight, as  
6 we normally charge on a commission basis and these would flow  
7 automatically into the IS. We apologize for not including  
8 this in the first tables in the report on page 9."

9 What's happening in that paragraph?

10 **A.** So this e-mail was at a time after the submission had  
11 been received before we finalized our decision. And the  
12 calculation -- the estimation of implementation shortfall  
13 should include all costs of executing the trade and there's  
14 an acknowledgment in here that the management fee of  
15 1.25 basis points, because it seems it was a bit different  
16 from the normal commission procedure, was not included in the  
17 implementation shortfall, and an acknowledgement that it  
18 should have been and an apology for that, so the  
19 implementation shortfall would have been adjusted  
20 accordingly.

21 **Q.** Can we look at Exhibit 76 in evidence, please.

22 You testified that there came a time when you  
23 awarded half of the transition to State Street and half to  
24 Nomura?

25 **A.** Yes.



1     **Q.** If we can look at this e-mail from Mr. Pennings to  
2     Mr. Buckley, dated December 23, 2010. And you see that you  
3     were copied on the e-mail?

4     **A.** Yes.

5     **Q.** And if we look at the second to last paragraph,  
6     beginning "in terms of the fees" --

7             MR. FRANK: Do you mind blowing that up, Erin?

8             MS. LEAHY: Oh, sure.

9     BY MR. FRANK:

10    **Q.** It says, "In terms of the fees, to reflect the fact that  
11    this is the most expensive half of the trade and that some of  
12    the more attractive pieces, i.e., Large Cap Europe and Asia,  
13    have been left out, we propose, with your agreement, to raise  
14    our fee to two basis points. From a trade strategy point of  
15    view, we still remain of the opinion that us managing the  
16    entire deal is the most beneficial for NTMA. And should you  
17    wish to reconsider, then we are willing to offer to do the  
18    entire trade for a fee of one basis point."

19             Do you see that?

20    **A.** Yes.

21    **Q.** How did you react to this proposal for State Street to  
22    increase its fee to two basis points?

23    **A.** So this was based on the split that we had decided when  
24    we split the transition between Nomura and State Street. And  
25    State Street's -- were making the case that their 1.25 basis

1 points had been priced on the basis of the entire basket.  
2 And in our split, they were making the case that the easier,  
3 if you like, parts of the trade -- particularly Large Cap  
4 Europe, had been assigned to Nomura and that it was -- that  
5 they had some of the more -- State Street had some of the  
6 difficult parts of the trade and some of the more costly  
7 parts.

8 And therefore, they were seeking to renegotiate the  
9 1.25 basis points, up to two basis points. And then we had  
10 some discussion on that and ultimately, we settled -- we  
11 agreed, there was a merit in the argument and we settled on  
12 an amount of 1.65 basis points in the end.

13 **Q.** Why did you not agree to pay the two basis points that  
14 they asked for?

15 **A.** Well, I think it was a pricing negotiation, if you like,  
16 and we felt while there was broad merit and we didn't accept  
17 that the quantum of the increase was justified, but we were  
18 happy to settle at 1.65.

19 **Q.** Did there come a time after this when you entered into a  
20 formal agreement?

21 **A.** Yes, we did. We signed a contract order with State  
22 Street.

23 **Q.** Is that also sometimes known as a periodic notice?

24 **A.** I think it could be. We used the phrase --

25 **Q.** You used the phrase "contract order"?

1       **A.** Yes, we used the phrase "contract order," yeah.

2       **Q.** Could we look at 99.2, please.

3               And is this that document?

4       **A.** Yes.

5       **Q.** Okay. And could we look under "special conditions."

6               You see under, "performance deliverables," it  
7 refers to the liquidation of approximately 4.8 billion euros  
8 in total from both equity and fixed income accounts?

9       **A.** Yes.

10       **Q.** And then if we look at the next page, the very bottom, do  
11 you see there's a payment schedule?

12       **A.** Yes.

13       **Q.** It says, "A fee of 1.65 basis points of the value of the  
14 assets as of the date," and it continues on the next  
15 page, "that the transition manager gains control over the  
16 legacy assets."

17               Do you see that?

18       **A.** Yes.

19       **Q.** And what is your understanding of that fee?

20       **A.** So that was the fee that State Street was going to earn  
21 and we were going to pay for the execution of the transition,  
22 1.65 basis points on the entire value of the assets.

23       **Q.** Why is there no mention of commissions or spreads in this  
24 document?

25       **A.** Because there were to be zero commissions and that was

1 the understanding, that was what we had agreed, so we only  
2 recorded over here what we were going to pay, and there was  
3 to be no commissions.

4 **Q.** I neglected to ask you, with respect to the last  
5 document, Mr. O'Callaghan. If we could take a quick look  
6 back at Exhibit 76.

7 In the header of that document, do you see there's  
8 a blind copy to the defendant?

9 **A.** Yes.

10 **Q.** Did you have an understanding that he was involved in  
11 this transition?

12 **A.** I wasn't aware that he was involved. I knew he was the  
13 global head of transition management and this was a big  
14 transaction, but I wasn't aware that Mr. McLellan was  
15 involved.

16 **Q.** Can we look at Exhibit 99.1 in evidence, please.

17 MR. FRANK: And if you could advance to the third  
18 page.

19 BY MR. FRANK:

20 **Q.** You recognize this to be the master transitions services  
21 agreement that you entered into with State Street?

22 **A.** Yes.

23 **Q.** And if we could look at the date. What is the date of  
24 this document?

25 **A.** The 9th of October 2007.

1 Q. Have you reviewed this document?

2 A. Yes.

3 Q. Is there anything in this document that you believe  
4 allows for the charging of additional commissions or spreads,  
5 beyond those disclosed in the contract order?

6 A. No, nothing.

7 MR. FRANK: Could we take a look at Exhibit 174,  
8 please. And actually, for the witness only.

9 BY MR. FRANK:

10 Q. Do you recognize this document?

11 A. Yes.

12 Q. There are three pages. Could we look at the next page?  
13 And the next page? Do you recognize these documents?

14 A. Yes.

15 Q. What are they?

16 A. They are the invoices from State Street, to us, for  
17 the -- for the management fee that had been agreed, one for  
18 each tranche, of the three tranches of the transition.

19 MR. FRANK: The Government offers 174.

20 MR. GOLDSTEIN: No objection, Your Honor.

21 THE COURT: Admitted.

22 (Exhibit No. 174 admitted into evidence.)

23 BY MR. FRANK:

24 Q. Could we look at the first page. There's some markings  
25 on this page in handwriting and a stamp. What do those

1 reflect, Mr. O'Callaghan?

2 **A.** They are internal authorization procedures, so there are  
3 signatures by Killian Buckley in relation to -- under goods  
4 received, that the service was received and that the amount  
5 was correct and the payment approved, was by Eileen  
6 Fitzpatrick, who was my number two at the time.

7 **Q.** You see the first tranche, you were billed approximately  
8 230,000 euros?

9 **A.** Yes.

10 **Q.** Could we look at the second page, please. For the  
11 second, you were billed approximately 35,000 euros?

12 **A.** Yes.

13 **Q.** Could we look at the third, please. And for the third,  
14 you were billed 432,000 euros?

15 **A.** Yes.

16 **Q.** Have you had an opportunity to add those numbers up?

17 **A.** Close to 700,000.

18 **Q.** And what was your understanding of what that 700,000  
19 euros represented?

20 **A.** So that was the total revenue that State Street would  
21 have earned from the -- from the transition. That was the  
22 management fee, where previously they might have earned  
23 commissions. This was the fee that we paid.

24 MR. FRANK: Take that down.

25 BY MR. FRANK:

1     **Q.** State Street performed the transition for you?

2     **A.** They did.

3     **Q.** How did they do?

4     **A.** They did well. There were -- the first tranche went well  
5 and the implementation shortfall outcome was better than the  
6 pre-trade estimate. And in discussion afterwards, there were  
7 certain market factors which had assisted that, but that was  
8 a very satisfactory outcome. The second tranche was very  
9 small, not very material. The third tranche was a little bit  
10 worse than the pre-trade estimate of implementation  
11 shortfall, but there were mitigating factors to do with the  
12 availability of securities for trading. We had issues with  
13 our global custodians, so that was the reason we agreed with  
14 Citibank -- or State Street. That was the reason for the  
15 slightly adverse performance, and overall, it was a very  
16 satisfactory result.

17     **Q.** Did there come a time when you learned that you had been  
18 charged something different from the 700,000 euros you had  
19 paid?

20     **A.** Yes. That emerged in October 2011, when there were media  
21 reports that Mr. McLellan and Mr. Pennings --

22             MR. GOLDSTEIN: I object, Your Honor.

23             MR. FRANK: I don't think he was going to --

24             THE COURT: I think it's beyond the scope of the  
25 question. The question was, did he learn at a time --

1 MR. FRANK: You're right, Your Honor. What  
2 happened?

3 BY MR. FRANK:

4 **Q.** How did you learn that you had been overcharged?

5 MR. GOLDSTEIN: Well, I object, Your Honor. I  
6 mean, if he just wants to ask him if he learned, then the  
7 answer is yes. That's fine.

8 THE COURT: He already asked that, and he said yes.

9 MR. FRANK: And I wanted to ask him how he learned.

10 MR. GOLDSTEIN: Well, I think it's --

11 Objection withdrawn, Your Honor.

12 THE COURT: I guess it depends. So I overrule it  
13 for now.

14 BY MR. FRANK:

15 **Q.** How did you learn that you had been overcharged?

16 **A.** So there were media reports, and --

17 THE COURT: What's the relevance to the newspaper  
18 reports?

19 MR. FRANK: He's not going to discuss the newspaper  
20 reports, Your Honor.

21 THE COURT: He just said --

22 MR. FRANK: I can move on, that's fine.

23 BY MR. FRANK:

24 **Q.** Did there come a time when you learned how much you were  
25 overcharged?



1       **A.** Yes, we were advised by State Street in around November.

2               MR. GOLDSTEIN: I --

3       BY MR. FRANK:

4       **Q.** Let me just stop you right there. I just want to learn  
5       what -- the amount you were overcharged was.

6               MR. GOLDSTEIN: Move to strike the reference to  
7       State Street.

8               MR. FRANK: No objection to that, Your Honor.

9               THE COURT: Strike. Disregard that portion. Go  
10       ahead.

11       BY MR. FRANK:

12       **Q.** Mr. O'Callaghan, did you learn what the amount was?

13       **A.** Yes.

14       **Q.** What was the amount?

15       **A.** 2.6 million euros.

16       **Q.** And what was that for?

17       **A.** And that was in respect of commissions which were  
18       incorrectly or improperly deducted from the sales proceeds  
19       that were achieved in the marketplace, when our securities  
20       were being sold.

21       **Q.** And did there come a time when you learned that there was  
22       an additional amount you had been overcharged?

23       **A.** Yes.

24       **Q.** What was that amount?

25       **A.** That was just under 800,000 US dollars.

1 Q. And what was that for?

2 A. That was in relation to the liquidation or realization of  
3 an exchange traded fund on the Russell 2000 index.

4 Q. So the total amount of the overcharge was?

5 A. It was about 3.2 million euros.

6 Q. That was on top of the approximately 700,000 euros that  
7 you had paid?

8 A. Yes.

9 Q. What was your reaction to learning that you had been  
10 overcharged?

11 MR. GOLDSTEIN: I object, Your Honor.

12 THE COURT: Overruled.

13 THE WITNESS: I was shocked, I think -- I was  
14 definitely shocked. I was incredulous, really, that, you  
15 know, there could have been improper amounts charged against  
16 our account by an entity or an organization as reputable as  
17 State Street. I knew it was serious, you know, 3.2 million  
18 euros. And it had happened on my watch and I knew -- you  
19 know, I was very bothered by it. I was shocked, bothered. I  
20 couldn't believe it, basically.

21 Q. Did there come a time when you were called to testify  
22 before a body known as the Oireachtas?

23 MR. GOLDSTEIN: I object, Your Honor.

24 THE COURT: What is the relevance of this?

25 MR. FRANK: Materiality, Your Honor.

1 THE COURT: What is this?

2 MR. FRANK: I'm happy to describe it at sidebar.

3 (The following discussion held at the bench.)

4 THE COURT: What is this body?

5 MR. FRANK: It's the joint Houses of Congress in  
6 Ireland. He was called to testify and called to account. He  
7 was grilled for several hours about why this had happened on  
8 his watch. It was highly relevant to materiality, it was a  
9 national scandal, and he nearly lost his job over it. The  
10 defense is contesting the materiality on these charges.

11 MR. GOLDSTEIN: Your Honor, this posthoc event that  
12 didn't go into his decision to select State Street, bears no  
13 relevance to materiality. It's incredibly prejudicial. It's  
14 going to raise the specter of this man going before the Irish  
15 Congress and answering questions. It's irrelevant and the  
16 relevance is substantially outweighed by the prejudice.

17 And my understanding is it was somebody else who  
18 was grilled. Mr. O'Callaghan was there, but he was not the  
19 principal person who was questioned or grilled before the  
20 parliament.

21 MR. FRANK: Mr. O'Callaghan was grilled and that's  
22 his understanding of what happened. And he testified and it  
23 was a big deal for him and it gets directly at the  
24 materiality of these massive overcharges.

25 THE COURT: Sustained. I don't think that's

1 directly material.

2 (Bench conference concluded.)

3 BY MR. FRANK:

4 **Q.** Would it have been important to you to know how much  
5 State Street intended to charge you prior to make making your  
6 decision to award them this transition?

7 **A.** Yes.

8 **Q.** Why?

9 **A.** This was -- this was part of our evaluation criteria.  
10 The fees were a significant part. It was also important from  
11 the perspective of transparency and the principle of  
12 transparency, which State Street had always been  
13 articulating. And -- but overall, it was part of our  
14 assessment process of the proposition that was put in front  
15 of us.

16 **Q.** Would it have changed the outcome?

17 **A.** If we had known about it, it would most certainly have  
18 changed the outcome, because the score that would have been  
19 awarded for fees in our assessment criteria for Citibank  
20 would have been -- for State Street would have been  
21 materially less.

22 MR. FRANK: No further questions.

23 THE COURT: Cross-examination.

24 MR. GOLDSTEIN: Thank you, Your Honor.

25 **CROSS-EXAMINATION BY COUNSEL FOR DEFENDANT**

1 BY MR. GOLDSTEIN:

2 Q. Good morning, Mr. O'Callaghan. As you testified during  
3 your direct examination, you don't know Mr. McLellan, right?

4 A. No.

5 Q. Never made any representations to you in the course of  
6 transition 14, which is the subject matter of Mr. Frank's  
7 direct examination?

8 A. No.

9 Q. Never asked him any questions about the transition,  
10 right?

11 A. Never asked me questions?

12 Q. You never asked him any questions?

13 A. No, not that I can recall, no.

14 Q. Mr. Buckley, as far as you know, didn't ask him any  
15 questions, right?

16 MR. FRANK: Objection as to what Mr. Buckley did.

17 THE COURT: Overruled. As far you know.

18 THE WITNESS: As far as I know, he didn't.

19 BY MR. GOLDSTEIN:

20 Q. Mr. McLellan didn't -- as far as you know, well, he  
21 didn't make any representations to you regarding the  
22 transition, correct?

23 A. That's correct.

24 Q. And as far as you know, didn't make any representations  
25 to Mr. Buckley, right?

1       **A.** As far as I know.

2               MR. GOLDSTEIN: Max, can we have Exhibit 66-1,  
3 please.

4 BY MR. GOLDSTEIN:

5       **Q.** This is the request for tender that I believe Mr. Frank  
6 asked you some questions about, correct?

7       **A.** I'm not sure -- I'm not sure if he asked about this  
8 document.

9       **Q.** Okay. He did ask you about the request for tender.

10              MR. FRANK: This document is not in evidence, Your  
11 Honor.

12              MR. GOLDSTEIN: Your Honor, I'd move to admit in  
13 66-1.

14              MR. FRANK: No objection.

15              THE COURT: Admitted.

16              (Exhibit No. 66-1 admitted into evidence.)

17 BY MR. GOLDSTEIN:

18       **Q.** This is the request for tender that you sent out to  
19 Citigroup, Nomura, and State Street Bank Europe Limited,  
20 right?

21       **A.** Yes.

22       **Q.** It's dated December 1, 2010?

23       **A.** Yes.

24       **Q.** And if I could -- and this sets out essentially what you  
25 were looking for from the panel that had been in existence

1 since, I think, 2007, correct?

2 **A.** Yes.

3 **Q.** All right. And if we go to page 3, paragraph 1, where it  
4 talks about the services, it references the transition  
5 manager, right? Required to liquidate up to \$10 billion.

6 You see that under the services?

7 **A.** Yes. At 10 billion euros.

8 **Q.** I'm sorry, 10 billion euros. Just jump to page 9 of 10,  
9 there's a subject matter that you'll see in a moment, which  
10 is called "award criteria." And this is the set of criteria  
11 that you reference during your direct examination in terms of  
12 how you would select amongst the different members of your  
13 panel, correct?

14 **A.** Yes.

15 **Q.** And so the first criteria is relevant experience and  
16 capability for transitions of this nature, correct?

17 **A.** Yes.

18 **Q.** And the weighting to that is 30 percent, right?

19 **A.** Including the transition team as part of that 30 percent  
20 as well. Yes.

21 **Q.** And the next is the trading strategy, that's assigned a  
22 weight of 30 percent, correct?

23 **A.** Yes.

24 **Q.** Fees is broken down into three subparts, correct?

25 **A.** Yes.

1 MR. GOLDSTEIN: Pull that up a little bit, I don't  
2 know if the jury -- you guys see that. Is that right? Okay.

3 BY MR. GOLDSTEIN:

4 Q. Consistency with fee bases quoted in RFP process is one,  
5 right?

6 A. Yes.

7 Q. Commissions payable to tender and to third parties is a  
8 second bullet point, correct?

9 A. Yes.

10 Q. And then any other fees or charges, right?

11 A. Yes.

12 Q. And that's assigned a 10 percent weighting, right?

13 A. Yes.

14 Q. And then 20 percent for estimated implementation  
15 shortfall and market impact and basis for estimation,  
16 correct?

17 A. Yes.

18 Q. And then another ten percent for material changes since  
19 Framework Agreement, right?

20 A. Yes.

21 Q. So 10 percent is the fees, 90 percent is attributable to  
22 other factors, right?

23 A. Not quite, because the fees would be part of the -- one  
24 element of the implementation shortfall, as well.

25 Q. Well, we can get there, but here, the category fees



1 including has a 10 percent weighting, right?

2 **A.** Yes.

3 MR. GOLDSTEIN: Could we have the Exhibit 82.2,  
4 Your Honor. Max.

5 THE COURT: Is that in evidence?

6 THE DEPUTY CLERK: No.

7 MR. GOLDSTEIN: I would move to admit 82-2, Your  
8 Honor.

9 MR. FRANK: I need to see what that is.

10 MR. GOLDSTEIN: It's the contract with the cover  
11 page. It's the TMA with the cover page on it.

12 MR. FRANK: I object, Your Honor. This witness has  
13 never seen that document.

14 MR. GOLDSTEIN: This document is in evidence in  
15 another Exhibit.

16 MR. FRANK: Then he can show him that other  
17 exhibit, Your Honor.

18 MR. JOHNSTON: 99.1.

19 MR. GOLDSTEIN: No, the cover page.

20 THE COURT: May I see what the document is?

21 MR. GOLDSTEIN: Sure.

22 MR. NEMTSEV: 99.1 has it.

23 MR. GOLDSTEIN: Okay. 99.1 has it? Okay. 99.1,  
24 please.

25 BY MR. GOLDSTEIN:

1 Q. You see that, Mr. O'Callghan?

2 A. It's quite difficult to read on the screen here.

3 Q. It is. You see your name there, the name of your entity,  
4 National Treasury Management Services?

5 A. Well, that's not the exact name of our entity, I  
6 assume -- sorry, is this a State Street document?

7 Q. It is, sir.

8 A. Yeah, so the name is slightly incorrect. It should be  
9 National Treasury Management Agency.

10 Q. And in terms of the counterparty domicile, the NTMA is  
11 located in Ireland. Do you see Ireland checked off there?

12 A. Yes.

13 Q. And on the counterparty type, is pension fund accurate?

14 A. That has always been a question of legal discussion,  
15 because actually the NTMA was a sovereign reserve fund, not a  
16 pension fund, so it depends on how legalistic you want to be.  
17 It wasn't actually a pension fund.

18 MR. GOLDSTEIN: Okay. And Max, quickly, if we  
19 could have 99-2.

20 BY MR. GOLDSTEIN:

21 Q. This is the contract for order services Mr. Frank went  
22 through with you, right?

23 A. Yes.

24 Q. Okay. And you see that the entity that you contracted  
25 with is State Street Bank Europe Limited. Do you see that,

1 sir?

2 **A.** Yes.

3 **Q.** And if we go to the signature page, there's also --  
4 there's a line for a signatory for State Street Bank Europe  
5 Limited to sign this contract and order for services,  
6 correct?

7 **A.** Yup.

8 **Q.** Okay.

9 MR. GOLDSTEIN: And while we're here, if we can go  
10 back to the first page, please, Max.

11 The contract for order services explicitly states,  
12 at paragraph 1, "The National Treasury Management Agency  
13 hereby accepts the tender submitted by you on 8  
14 December 2010, to perform services as set out in the request  
15 for tender on the following basis."

16 BY MR. GOLDSTEIN:

17 **Q.** Do you see that?

18 **A.** Yes.

19 **Q.** And then it provides, "Unless and except to the extent  
20 that this contract order expressly states otherwise, the  
21 terms and conditions of the Framework Agreement entered into  
22 between the NTMA and State Street on 9th of October 2007, per  
23 in the Framework Agreement, shall be read as a whole and  
24 deemed to form and be read and constructed as part of this  
25 contract order for services, together the contract."

1 Do you see that?

2 **A.** Yes.

3 **Q.** "The terms and conditions of this contract order for  
4 services shall prevail in the event of a conflict with or  
5 ambiguity in the terms and conditions of the Framework  
6 Agreement."

7 Correct?

8 **A.** Yes.

9 MR. GOLDSTEIN: Now, if we can go back to cover  
10 page on 82- -- 99-1, Max, please.

11 BY MR. GOLDSTEIN:

12 **Q.** You see there's a section "contracting entity." Do you  
13 see that?

14 **A.** Yes.

15 **Q.** And you see that there's a check mark for State Street  
16 Bank Europe Limited, right?

17 **A.** Yes.

18 **Q.** Consistent with the contract for order services, right?

19 **A.** Seems to be, yeah.

20 **Q.** Okay. We'll go to "initiating site." The box London is  
21 checked off.

22 **A.** I'm assuming -- I haven't seen this document. This is  
23 all State Street documentation, but State Street Bank Europe  
24 was based in London. Yes.

25 **Q.** That was my question. It's consistent with your

1 understanding of where State Street Bank Europe Limited is  
2 located, right?

3 **A.** Yes.

4 **Q.** And then there's the securities trading agreement types.  
5 There's a bunch of different boxes and transition management  
6 is -- has the check mark, correct? Do you see that?

7 **A.** Yes, I do. I do.

8 **Q.** All right. And then sub category, there's a check mark  
9 next to transition management master agreement. Do you see  
10 that, sir?

11 **A.** Yes.

12 **Q.** And then finally, governing law, there's a bunch of  
13 different jurisdictions, and Ireland has a check mark next to  
14 it, right?

15 **A.** Yes.

16 **Q.** And your understanding was that this transition would be  
17 governed by Ireland law. Is that consistent with your  
18 understanding?

19 **A.** That was part of a Framework Agreement in 2007, yes.

20 MR. GOLDSTEIN: Okay. And if we could go to the  
21 actual Framework Agreement, Max.

22 MR. GOLDSTEIN:

23 **Q.** At the top, it's addressed to Mr. Edward Pennings, State  
24 Street Bank Europe Limited, correct?

25 **A.** Sorry, I can't see what that document is and that page

1 is, but I can see below that as to whether it's a Framework  
2 Agreement, like you said.

3 MR. GOLDSTEIN: Okay. If we go to the second page,  
4 Max, just show him that.

5 THE WITNESS: Yeah, I recognize that.

6 MR. GOLDSTEIN: Okay. Go back to the first page,  
7 please. And just blow up the body of the letter, please.  
8 Including the date, Max, sorry.

9 BY MR. GOLDSTEIN:

10 Q. It's a letter dated October 10, 2007. Do you see that,  
11 sir?

12 A. Yes.

13 Q. References Framework Agreement, right?

14 A. Yes.

15 Q. It's written by a person by the name of Aideen O'Riley,  
16 do you see that?

17 A. Yes.

18 Q. Employed by your agency, sir, at the time?

19 A. Yes.

20 Q. As a senior legal advisor?

21 A. Yes.

22 Q. Did you have other in-house lawyers -- or is that Mr. or  
23 Ms. O'Riley?

24 A. Ms. O'Riley.

25 Q. Ms. O'Riley. Is she the only lawyer, or did you have

1 other lawyers?

2 **A.** We have a lot more now. We would have had a small  
3 number. She was the senior lawyer at the time who dealt with  
4 all of these issues.

5 **Q.** Okay. And would you ever outsource -- if you had legal  
6 needs, would you hire outside counsel to assist you?

7 **A.** NTMA does that on regular occasions, but not always.

8 **Q.** Okay. Go back to, it says "Dear Ed, with reference to  
9 the above, I now enclose the Transition Management Services  
10 Framework Agreement, dated the 9th of October 2007. I would  
11 be grateful if you would arrange to have the agreement signed  
12 on behalf of State Street Bank Europe and return one part for  
13 my attention."

14 Do you see that, sir?

15 **A.** Yes.

16 **Q.** All right. So again it's going to be signed on behalf of  
17 the entity known as State Street Bank Europe, right?

18 **A.** Yes.

19 **Q.** And if we quickly go through some of the provisions --

20 MR. GOLDSTEIN: On the next page, Max.

21 BY MR. GOLDSTEIN:

22 **Q.** A "whereas" clause. "NTMA may require a transition  
23 manager to perform transition management services." Correct?

24 **A.** Yes, from time to time. Yes.

25 **Q.** And a transition manager is defined above to be a

1 specific entity and that is --

2 MR. GOLDSTEIN: Right above, Max.

3 BY MR. GOLDSTEIN:

4 Q. State Street Bank Europe Limited is identified as the  
5 transition manager, right?

6 A. Yes.

7 Q. And down at the bottom, there's a definition  
8 for "affiliate." Right?

9 A. Yes.

10 Q. And you read this agreement before it was signed, right?

11 A. Yes.

12 Q. All right. So you understood that State Street Bank  
13 Europe Limited, therefore, had affiliates, right?

14 A. Yes.

15 Q. And if we just jump to paragraph 6.4. This is a  
16 paragraph setting out that the NTMA was a sophisticated  
17 investor, correct?

18 A. Yes. Institute with assets more -- if that's what  
19 sophisticated means, yes.

20 Q. Or institutional investor?

21 A. Institutional investor, definitely.

22 Q. Okay. Paragraph 9.1.

23 "Transition manager is regulated by the financial  
24 services authority."

25 Is that correct?



1     **A.** Yes, it was their representation. I'm sure it was  
2     correct.

3                 MR. GOLDSTEIN: And paragraph 12.12 and 12.1,  
4     please, Max.

5     BY MR. GOLDSTEIN:

6     **Q.** This is "assignment, subcontracting, and delegation,"  
7     right?

8     **A.** Yup.

9     **Q.** And by the way, did you review this contract with Mr.  
10    Frank before you testified?

11    **A.** Not with Mr. Frank. I've reread it since then. And in  
12    preparing for the case, it was material that I needed to  
13    refresh myself on.

14    **Q.** But not with Mr. Frank in your preparation to testify?

15    **A.** So --

16    **Q.** Yes or no. Did you go through this with Mr. Frank?

17    **A.** It depends on what you mean -- sorry. It depends on what  
18    you mean by going through it. We didn't go through it clause  
19    by clause, but there was -- we did discuss that the Framework  
20    Agreement would be an important document for me to be  
21    refreshed on.

22    **Q.** And if we look at 12.1, it reads that the "Transition  
23    manager will not transfer or assign, directly or indirectly,  
24    any part of this Framework Agreement, or any contract order  
25    without the prior written consent of the NTMA. The

1 transition manager will not subcontract any element of the  
2 services without the prior written consent of the NTMA, which  
3 consent may be withheld at the NTMA's absolute discretion."

4 Right?

5 **A.** Yeah.

6 **Q.** It gives you some authority in terms of whether or not  
7 you provide consent under those circumstances, right?

8 **A.** That's correct.

9 **Q.** It says that "Nothing in this clause will prohibit or  
10 restrict the transition manager's ability to use or appoint  
11 execution agents and brokers in undertaking the services."

12 Right? Did I read that correctly?

13 **A.** Yes.

14 MR. GOLDSTEIN: If we could have Exhibit 70,  
15 please, Max.

16 BY MR. GOLDSTEIN:

17 **Q.** This is 70-1. It is the proposal response that State  
18 Street submitted to NTMA, in which Mr. Frank went through  
19 with you. Do you recall this line of questioning on direct  
20 examination?

21 **A.** Yes.

22 **Q.** If we could turn to page 9, please. Mr. Frank went  
23 through with you that, under "equity commissions," there's a  
24 zero under 1.2 cost summary. Is that accurate, meaning in  
25 terms of what you reviewed on direct examination?

1       **A.** Yes.

2       **Q.** Underneath "equity commissions," there's an equity  
3 bid-ask spread figure, correct?

4       **A.** Yes.

5       **Q.** And it's a little bit more than \$3.4 million?

6       **A.** Yes.

7       **Q.** And then scenario two, which was --

8               THE COURT: Is that dollars or euros?

9               MR. GOLDSTEIN: Euros. I'm --

10       BY MR. GOLDSTEIN:

11       **Q.** Well, what is it?

12       **A.** Euros, beg your pardon. Yes, euros. That's correct.

13       **Q.** And then onto scenario two, it -- again equity  
14 commissions is zero, but it also has an equity bid-ask spread  
15 figure, which is almost, but not exactly the same as scenario  
16 one, correct?

17       **A.** Yes.

18       **Q.** Now, it's not simply the proposal that you receive, but  
19 you also received pre-trade submissions by State Street,  
20 correct? That set out what the implementation shortfall  
21 expectations or estimates would be?

22       **A.** Yes.

23       **Q.** And you testified on direct examination -- putting aside  
24 your testimony about your belief that you were overcharged,  
25 when you got the final post trades for the liquidation of the

1 NTMA assets, you said you were extremely satisfied with the  
2 results, right?

3 **A.** I think I said very satisfied, but yes.

4 **Q.** My apologies, very satisfied?

5 **A.** Yeah. Yeah.

6 **Q.** Now, you understand that -- well, it's accurate, right?  
7 I mean, before you go through with the transition, State  
8 Street provides what's called a pretransition implementation  
9 shortfall analysis, right?

10 **A.** Yes.

11 **Q.** And in that, State Street provides an estimate, a  
12 prediction, a hope of what it would cost to conduct the  
13 transition at issue, right?

14 **A.** Yeah. An all-in cost.

15 **Q.** Right.

16 **A.** Yeah.

17 **Q.** And it's broken out both in terms of equity transactions  
18 and fixed income transactions, correct?

19 **A.** Are you referring to a specific document? But in  
20 general, yes, I agree, yeah.

21 MR. GOLDSTEIN: So Max, the tranche one, pre-trade.

22 THE COURT: Is that already in evidence?

23 MR. GOLDSTEIN: It's not an exhibit?

24 MR. NEMTSEV: No.

25 MR. GOLDSTEIN: Okay.

1           Your Honor, may I have -- I need these marked --  
2           they're marked up, so I'll have to replace them. But I'd  
3           like to mark for identification at this point, unless there's  
4           no objection. I'd like to move into evidence the equity  
5           pretransition implementation shortfall analysis, prepared by  
6           NTMA, number 14, dated February 24, 2011.

7           MR. FRANK: No objection, Your Honor.

8           THE COURT: All right.

9           MR. GOLDSTEIN: And the fixed income pre-trade  
10          analysis, also dated February 24, 2011.

11          THE COURT: Do we know what the next unused number  
12          is?

13          THE DEPUTY CLERK: Do you know what the -- I think  
14          it's 513.

15          THE COURT: 513.

16          MR. NEMTSEV: 560.

17          THE COURT: 560.

18          MR. GOLDSTEIN: So I'll do it -- so the equity  
19          pre-transition implementation shortfall analysis will be  
20          Exhibit 560, and the fixed income, pre-trade analysis, dated  
21          February 24, 2011, will be 561.

22          THE COURT: Yes.

23          (Exhibit Nos. 560 and 561 admitted into evidence.)

24          THE COURT: So ladies and gentlemen, the reason for  
25          the high numbers is lots of documents, in the course of the

1 case, get marked. The lawyers don't necessarily offer  
2 everything and -- or sometimes there's duplicate copies and  
3 you don't need three copies of the same document. One copy  
4 suffices if there is nothing different between the documents.

5 So you should infer nothing from the fact that the  
6 numbers might not be sequential and that's why sometimes  
7 we're looking for just the next number, to be sure we don't  
8 overlap with another number that might be used by someone  
9 else.

10 Go ahead.

11 MR. GOLDSTEIN: So I'll need the Elmo.

12 BY MR. GOLDSTEIN:

13 **Q.** You recognize this document, Mr. O'Callaghan, as the  
14 equity pre-transition implementation shortfall analysis?

15 **A.** Yeah, that's the title, yes.

16 **Q.** Okay. And this is a document that was provided to the  
17 NTMA by State Street, before the first tranche. Is that fair  
18 to say?

19 **A.** Yeah, I'm pretty certain the 24th of February was just  
20 before the first tranche.

21 **Q.** Okay. And you testified there were three different  
22 stages or tranches for this --

23 **A.** Yes.

24 **Q.** -- liquidation exercise, correct?

25 **A.** Yeah.

1 Q. All right. And so equity refers to shares, correct?

2 A. Yes.

3 Q. Stock. And then if we go to the second page of this  
4 document -- this is going to be tough.

5 MR. GOLDSTEIN: Your Honor, may I just approach the  
6 witness? I think it might be easier.

7 THE COURT: Yes.

8 MR. GOLDSTEIN: All right.

9 BY MR. GOLDSTEIN:

10 Q. So Mr. O'Callaghan, on the second page of this document  
11 is where State Street provides what it -- the estimated cost  
12 of implementing this tranche one, for the equity piece of  
13 tranche one, correct?

14 A. Yeah. That's what it looks like, yes.

15 Q. Okay. And in terms of the market value of what was  
16 being -- the equities that were being transitioned, it's  
17 1,228,000,000 and change, correct?

18 A. Yes.

19 Q. And then in terms of commissions, there's no commission  
20 listed, correct?

21 A. Zero commission, yeah.

22 Q. The bid-ask spread is \$1,028,731, right?

23 THE COURT: Euros. Euros or dollars?

24 MR. GOLDSTEIN: I'm showing my isolationist  
25 tendencies.

1 BY MR. GOLDSTEIN:

2 Q. Euros?

3 A. Euros.

4 Q. Okay.

5 A. Sorry -- this has actually got dollars headed on the  
6 heading there.

7 Q. And so the bid-ask rev was a little more than a million  
8 dollars. 1,028,000, right?

9 A. Right.

10 Q. And the market impact is listed at 6,998,658, correct?

11 A. Almost, yeah.

12 Q. There's an entry for FX spread?

13 A. Yes.

14 Q. And there's a taxes and fees line, correct?

15 A. Yes.

16 Q. And so the estimate for the total costs for the equity  
17 part of tranche one, comes out to what? Can you --

18 A. 8.8 million, approximately.

19 Q. Okay. And then you'd also received what's been marked as  
20 Exhibit 561, same kind of document, what State Street  
21 estimates to transition the fixed income piece of tranche  
22 one, correct?

23 A. Yes.

24 Q. And within that estimate, there's a beginning portfolio  
25 value of 137,760,188 euros, correct?



1       **A.**    Yes.

2       **Q.**    And underneath that, in terms of cost, there's a bid-ask  
3       spread of 244,966, correct?

4       **A.**    Yes.

5       **Q.**    And the total estimated cost would be 244,966, correct?

6       **A.**    Yeah.

7       **Q.**    Or about 17.8 basis points, right?

8       **A.**    Yes.    Yes.

9       **Q.**    Now, you also receive -- after tranche one is complete,  
10       you receive what's called a post-transition implementation  
11       shortfall analysis, right?

12       **A.**    Yes.

13       **Q.**    And that's where State Street provides you with the  
14       actual results of the transition, right?

15       **A.**    Yes.

16               MR. GOLDSTEIN:  Is Exhibit 138-01 in evidence?

17               THE DEPUTY CLERK:  138-01 I have as 66.

18               MR. GOLDSTEIN:  It's in?  Okay.

19               Your Honor, I am just going to leave the  
20       pre-transitions --

21               THE COURT:  Leave the -- oh, there.  Fine.  138-01  
22       is in, Maria?

23               THE DEPUTY CLERK:  I have it as 66.

24               MS. LEAHY:  Yeah.

25               THE DEPUTY CLERK:  You do?

1 MR. GOLDSTEIN: In evidence?

2 THE COURT: Yes.

3 MR. GOLDSTEIN: Max, if we could just show them the  
4 front page.

5 THE COURT: Maria, you have to switch back.

6 BY MR. GOLDSTEIN:

7 Q. This is the post-transition implementation shortfall  
8 analysis you received?

9 A. Yup.

10 Q. Dated 3/29 of '11, correct?

11 A. Yup.

12 Q. And if we go to the equity analysis.

13 MR. GOLDSTEIN: Page 6 of 81, please, Max, and if  
14 you could blow up the starting value of the global equity,  
15 the total.

16 BY MR. GOLDSTEIN:

17 Q. Mr. O'Callaghan, do you see that the total starting value  
18 of the actual transition was 1,229,210,041, right?

19 A. Yes.

20 Q. And if you could go back -- this is --

21 MR. GOLDSTEIN: If we go back one page, this is  
22 with the equity analysis, Max. Can we go back one page from  
23 this? Okay.

24 BY MR. GOLDSTEIN:

25 Q. How does that -- how does that starting figure compare to

1 the pre-trade, sir?

2 **A.** It's very -- it's 122 -- it's very similar. It's not  
3 quite the same, but very similar.

4 **Q.** A little bit more, in terms of the actual --

5 **A.** Yeah, tiny amount.

6 **Q.** And by "tiny," how much is that?

7 **A.** On asset value, it's 1.229, and as compared to 1.228  
8 there may have been, you know, market moves or some other  
9 factors which might have accounted for a timing difference in  
10 evaluations.

11 **Q.** So tiny would be about a million dollars?

12 **A.** I would say tiny might be too strong. It's a very small  
13 amount in the context of 1.229, and asset values of  
14 1.229 billion.

15 **Q.** Okay.

16 MR. GOLDSTEIN: And if we could go to page 7,  
17 please. The table on the right-hand side, Max.

18 BY MR. GOLDSTEIN:

19 **Q.** So this is the actual costs incurred during the  
20 transition, correct?

21 **A.** I assume so. I'm --

22 MR. GOLDSTEIN: Max, if you show him the top left  
23 implementation shortfall box, so he can just orient himself.

24 BY MR. GOLDSTEIN:

25 **Q.** Do you see that, sir?

1       **A.** Yes.

2       **Q.** Well, these are what the actual cost of the transition as  
3 compared -- well, no. They're the actual cost, correct?

4       **A.** Yes.

5       **Q.** All right. So we'll go back to the bottom right box?

6       **A.** Yes.

7       **Q.** State Street Global Management, there's a fee there of  
8 \$220,410, correct?

9       **A.** That's what set out, yes.

10      **Q.** There's a small commission cost of about 15,000?

11      **A.** Yes.

12      **Q.** And then there's a bid-ask spread cost of 1 million -- or  
13 a little more than a million dollars, correct -- or a million  
14 euros. Do you see that, sir?

15      **A.** I do, yeah. Sorry.

16      **Q.** And how does that compare to the estimated cost in the  
17 pre-trade for the equities, the bid-ask?

18      **A.** The bid-ask is lower than the pre-trade.

19      **Q.** Meaning the actual bid-ask that was incurred was lower  
20 than the estimated bid-ask contained in the pre-trade, right?

21      **A.** Yes, there will always be differences, but yes.

22      **Q.** Right. And then there's a market impact cost of  
23 6,497,000 or so, right?

24      **A.** Yes.

25      **Q.** And is that more or less than what was estimated before

1 the transition?

2 **A.** That's less than was -- so I should make the point that  
3 the -- the estimate beforehand is a central case estimate.  
4 There's a variability attaching to it, which was a very  
5 important part of the pre-trade estimate, as well, but it's  
6 less than.

7 **Q.** There's no doubt about that, but in terms of the actual  
8 numbers --

9 **A.** It's less than the central case.

10 **Q.** It's less than what was estimated, right?

11 **A.** Yes.

12 **Q.** And you see in the post trade, there's an entry for  
13 taxes, there's an entry for FX cost, and then there's an  
14 opportunity cost. Do you see that?

15 **A.** Yes.

16 **Q.** It's bracketed and it's 8,896,000 or so. Do you see  
17 that?

18 **A.** Yes.

19 **Q.** That bracket means that that was money actually -- it was  
20 not a cost, it was a gain to the portfolio, correct?

21 **A.** Yeah, relative to the implementation shortfall benchmark,  
22 which is the methodology for calculating implementation  
23 shortfall, yes.

24 **Q.** All right. And so you get to the bottom, total cost, the  
25 total cost of the actual implementation, including everything

1 above it, is 468,196, right?

2 **A.** Yes.

3 **Q.** And how does that compare to the estimated costs in the  
4 pre-trade?

5 **A.** It's substantially less.

6 **Q.** The estimated cost was --

7 **A.** 8.8 million.

8 **Q.** 8.8 million, right?

9 **A.** Yes.

10 MR. GOLDSTEIN: And if we go to page 11, please,  
11 Max.

12 BY MR. GOLDSTEIN:

13 **Q.** Mr. Frank asked you questions about the iShare Russell  
14 2000 piece of this transition. Do you see that, sir?

15 MR. GOLDSTEIN: Bottom box, Max, top line.

16 BY MR. GOLDSTEIN:

17 **Q.** Do you see that, sir?

18 **A.** Yes.

19 **Q.** Again, we have a bracketed number, right?

20 **A.** Yes.

21 **Q.** So the liquidation or execution of those shares ended up  
22 gaining in excess of 2.6 million, correct?

23 **A.** Yes. On this tranche, yes. Yup.

24 **Q.** Okay.

25 **A.** Sorry, that's relative -- it's a gain relative to the

1 benchmark, which would have been the price at the start of  
2 the -- the market price at the start of the transition  
3 period.

4 **Q.** Yes. Thank you.

5 MR. GOLDSTEIN: And Max, if we can go to the fixed  
6 income analysis piece of this, page 14 of 81, please.

7 BY MR. GOLDSTEIN:

8 **Q.** On your screen, sir, this is -- on the top left, this is  
9 the implementation shortfall analysis for the fixed income  
10 piece, correct?

11 **A.** Yes.

12 **Q.** And starting value of the fixed income is listed at  
13 137,709,544, correct?

14 **A.** Yes.

15 **Q.** And how does that compare to the estimated cost in the  
16 pre-trade, sir?

17 **A.** It's very similar, again, probably minor market moves or  
18 timing variances.

19 **Q.** A little bit less, right?

20 **A.** Yes, very slightly less.

21 MR. GOLDSTEIN: And then the bottom right column,  
22 table, Max, the implementation shortfall analysis.

23 BY MR. GOLDSTEIN:

24 **Q.** We have a bid offer spread where the actual cost was  
25 200,482, correct?

1       **A.**    Yes.

2       **Q.**    And if we go back to the pre-trade, the actual cost was  
3       less than what was estimated in the pre-trade, right?

4       **A.**    Yes, the pre-trade was 244.

5       **Q.**    And so the total cost, in terms of going back to the  
6       table on the screen, 242,202. Do you see that?

7       **A.**    Yes.

8       **Q.**    That's actually a couple thousand dollars less than what  
9       was estimated in the pre-trade, right?

10      **A.**    Yes.

11      **Q.**    Okay. And you testified that in terms of tranche two, I  
12      think you testified it was a minor transition, right?

13      **A.**    It was much smaller than one or three.

14      **Q.**    And do you recall that, once again, the actual costs  
15      incurred for tranche two were slightly less than what had  
16      been estimated by State Street?

17      **A.**    I can agree that based on that -- that page, yes.

18      **Q.**    Well, no. I'm now referring to tranche two, sir. This  
19      is tranche one, I think.

20      **A.**    So tranche two is the fixed income, the 244 and the 242.  
21      Is that correct? Sorry.

22               MR. GOLDSTEIN: That's okay.

23               Your Honor, can I just show him a document to  
24      refresh his memory?

25               THE COURT: Yes.



1 BY MR. GOLDSTEIN:

2 Q. Mr. O'Callaghan, take your time, I'm just showing you a  
3 document to refresh your recollection as to tranche two.

4 A. Yup.

5 Q. Okay. So having shown you this document,  
6 Mr. O'Callaghan, does it refresh your memory that as for  
7 tranche two, the implementation shortfall was .16 percent  
8 against the pre-trade estimate of .179, slightly less in  
9 terms of the actual cost?

10 A. Yes, that sounds about right to me.

11 MR. GOLDSTEIN: Thank you.

12 BY MR. GOLDSTEIN:

13 Q. And then there was a third and final tranche, right?

14 A. Yes.

15 MR. GOLDSTEIN: Are these pre-trades in evidence?

16 No.

17 Steve, do you have an objection to the --

18 MR. FRANK: No.

19 MR. GOLDSTEIN: Your Honor, I move in, as the next  
20 two exhibits, the equity pre-transition implementation  
21 shortfall analysis.

22 THE COURT: Admitted at 562.

23 No objection, right, Mr. Frank?

24 MR. FRANK: No objection, Your Honor.

25 THE COURT: And the next one is what?

1 MR. GOLDSTEIN: The next one is fixed income  
2 pre-trade analysis, both of which are dated April 6th.

3 THE COURT: Admitted as 563.

4 (Exhibit Nos. 562 and 563 admitted into evidence.)

5 MR. GOLDSTEIN: May I just hand these to the  
6 witness?

7 THE COURT: You may.

8 MR. GOLDSTEIN: Thank you.

9 BY MR. GOLDSTEIN:

10 Q. Mr. O'Callaghan, I'm showing you what's been admitted  
11 into evidence. Those are the pre-trade estimates submitted  
12 by State Street in response to the third tranche of this  
13 transition exercise, correct?

14 A. Yes.

15 Q. And if you turn to the --

16 MR. GOLDSTEIN: May I approach, Your Honor?

17 THE COURT: You may.

18 BY MR. GOLDSTEIN:

19 Q. Again, Mr. O'Callaghan, it shows the -- the pre-trade  
20 shows the estimated market value of the equity piece of this  
21 transition, right?

22 A. Yes.

23 Q. And can you just read the number to the jury?

24 A. 2,986,442 million. That's 2.986 billion euros, 442.

25 Q. Okay. And if you turn to the next page. I'm sorry, not

1 the next page. It also has listed, again, those different  
2 costs that are estimated in terms of the transition, right?

3 **A.** Yes.

4 **Q.** There's zero cost associated with the line that's  
5 entitled commissions, right?

6 **A.** Yes.

7 **Q.** Then there's an entry for bid-ask spread, correct?

8 **A.** Yes.

9 **Q.** And what figure is listed as an estimate for the bid-ask  
10 spread for the equity piece of this transition?

11 **A.** 1,263,422.

12 **Q.** And there's a market impact line, as well?

13 **A.** Yeah.

14 **Q.** And can you read that number in terms of the State Street  
15 estimate?

16 **A.** 4,691,235.

17 **Q.** And there's no entry for opportunity cost, correct?

18 **A.** Not at the pre-trade. At the pre-trade point. That only  
19 emerges afterwards.

20 **Q.** And the total estimated cost for the equity piece of this  
21 transition, can you read that number for the jury, please?

22 **A.** 6,676,266.

23 **Q.** Okay. If I can direct your attention to the fixed income  
24 analysis. Again, this is State Street's estimate to  
25 transition the fixed income piece of tranche three, correct?

1       **A.**   Yes.

2       **Q.**   And the estimated portfolio value of the fixed income  
3       instruments, can you read that figure to the jury?

4       **A.**   67,805,117.   805,117.

5       **Q.**   And in terms of estimated cost, there's an entry for  
6       bid-ask spread, correct?

7       **A.**   That's correct.

8       **Q.**   And if you can just read that number, please?

9       **A.**   144,680.

10      **Q.**   Again, no opportunity cost, correct?

11      **A.**   No, there wouldn't be one at the pre-trade stage.

12      **Q.**   And the total estimated costs, can you read that figure?

13      **A.**   It's the same number, 144,680.

14      **Q.**   Okay.

15               MR. GOLDSTEIN:   So is that Exhibit 170-01?

16               MR. FRANK:   I don't think that's the consolidated  
17       one.

18               MR. GOLDSTEIN:   What's that?

19               MR. FRANK:   I'm not sure that's the consolidated  
20       one.

21               MR. GOLDSTEIN:   Okay.   All right.

22               Could we have Exhibit 170-1, please, Max.

23               THE DEPUTY CLERK:   Is that in evidence?

24               MR. GOLDSTEIN:   According to Mr. Johnston, it is.

25       BY MR. GOLDSTEIN:

1     **Q.** This is the post-transition implementation shortfall  
2     analysis. This is post-transition, right?

3     **A.** Yes.

4     **Q.** And this is where State Street provides to the NTMA what  
5     the actual costs of implementation were, right?

6     **A.** Yes.

7             MR. GOLDSTEIN: And if we turn to page 3 at the  
8     bottom, Max.

9     BY MR. GOLDSTEIN:

10    **Q.** You testified on direct examination that the actual costs  
11    incurred in tranche three were higher than the estimated  
12    cost, correct?

13    **A.** Yes.

14    **Q.** You testified that there was some issue in terms of  
15    certain shares being available -- not being available at the  
16    opportune time, right?

17    **A.** Yes.

18    **Q.** And that's reflected in this --

19             MR. GOLDSTEIN: Bottom paragraph, Max, please.

20    BY MR. GOLDSTEIN:

21    **Q.** Where it says, "Due to the number and value of stocks  
22    that were unavailable at the start of trading and then in  
23    many cases do not become available for several days later,  
24    the transition cannot easily be measured using the IS  
25    benchmark."

1 Right? You see that, sir?

2 **A.** That's what's written down, yes.

3 **Q.** And that's what you had testified to on direct  
4 examination, right?

5 **A.** I don't know that I testified can easily be measured. I  
6 think it can be measured, but the reason for a difference  
7 might be because of those factors, or the main reason for an  
8 adverse -- or a slightly adverse outcome might be due to  
9 those factors.

10 **Q.** And that reason was understood by you at this time?

11 **A.** Yes. And it was a rare making on our side and not on  
12 State Street's side.

13 **Q.** Okay.

14 MR. GOLDSTEIN: And if we turn to page 6, please,  
15 Max. Actually, you can just go to page 7, please.

16 BY MR. GOLDSTEIN:

17 **Q.** This is the implementation shortfall analysis for the  
18 equity piece of the transition. Do you see that?

19 **A.** Yup.

20 **Q.** And in terms of the actual starting value, could you --  
21 it's 2,972,000,000 and change, right?

22 **A.** Yeah.

23 **Q.** And how does that compare to the pre-trade estimate?

24 **A.** 2,986,000,000 and change, as you say.

25 **Q.** So slightly lower, right?

1       **A.**   Yes.

2       **Q.**   14 million?

3       **A.**   Yes.

4       **Q.**   And then on the right-hand side, there's a table which  
5       provided the costs, right?

6       **A.**   Yes.

7       **Q.**   And again, there's a 224 next to the commission line,  
8       right?

9       **A.**   Yes.

10      **Q.**   And then the bid-ask spread, the actual cost incurred was  
11      1,363,203, correct?

12      **A.**   Yes.

13      **Q.**   And how does that compare to the pre-trade estimate?  
14      Slightly more?

15      **A.**   Pre-trade was 1263, so it's about 100,000 more.

16      **Q.**   Okay. And there's a line for market impact cost,  
17      \$4,522,075, right?

18      **A.**   Right.

19      **Q.**   And that's slightly below what the pre-trade estimate of  
20      4691, right?

21      **A.**   4691. Yeah.

22      **Q.**   And then there's an opportunity cost listed of -- in  
23      excess of 13 million. Do you see that, sir?

24      **A.**   Yes.

25      **Q.**   And that was not in the pre-trade estimate, right?

1     **A.** Yeah. That's an outcome that would never be estimated in  
2     advance, yes.

3     **Q.** And so that was the driving -- a driving force of the  
4     total costs, right?

5     **A.** Yes.

6     **Q.** And that goes back to what we had just talked about on  
7     the page 2 or so, that certain shares were not available and  
8     that impacted the opportunity costs?

9     **A.** Yes, that's correct.

10    **Q.** And so the total cost was 14,356,347. Do you see that?

11    **A.** Yes.

12    **Q.** And that's a -- 7 million plus more than what's in the  
13    pre-trade, right?

14    **A.** Yes.

15    **Q.** And we're almost there, but if we go through the fixed  
16    income piece, as well?

17                 MR. GOLDSTEIN: Max, it's page 14.

18    BY MR. GOLDSTEIN:

19    **Q.** There's a market value of 67,950,422, right?

20    **A.** Yes.

21    **Q.** Slightly less than what was in the pre-trade?

22    **A.** Slightly more, actually. It's 67805 beforehand.

23    **Q.** You're right.

24                 MR. GOLDSTEIN: And then there's a bid-ask spread  
25    on the bottom right, Max, bottom table on the right-hand



1 side.

2 BY MR. GOLDSTEIN:

3 Q. There's a bid offer spread of 125,708, right?

4 A. Yes.

5 Q. How does that compare to the bid offer spread in the --  
6 that was estimated in the pre-trade?

7 A. Well, the pre-trade was 134,000, so it's 9,000 less.

8 Q. Again, no opportunity cost in the pre-trade, but there's  
9 an opportunity cost here of 131,173. That's an actually --  
10 that's a gain?

11 A. Yes.

12 Q. Okay. And then the total cost, there's actually a gain  
13 on the fixed income side, right?

14 A. Yes.

15 Q. And so the pre-trade estimate estimated a cost of  
16 approximately \$134,680 and it ends up that there was a gain  
17 on the fixed income side.

18 A. Of 5,000.

19 Q. Okay. Mr. O'Callaghan, have you taken the time, in the  
20 course of examining the results of the transition management  
21 services provided by State Street Bank Europe Limited to  
22 compare what the estimated total costs were, versus the  
23 actual total cost, meaning adding up all of these different  
24 numbers that we just went through?

25 A. Do you mean at the time?

1     **Q.** At the time, or since then.

2     **A.** Well, at the time, we -- we evaluated the report that  
3     you've just outlined, against the pre-trade, and we had the  
4     discussions on the factors that might have caused  
5     differences, and that led us to the conclusion at the time  
6     that we were satisfied with the implementation shortfall  
7     outcome, very satisfied with it. And you know, I haven't  
8     spent too much time since then looking at it. That's my view  
9     then and it remains my view, that the trading outcome was  
10    very satisfactory.

11    **Q.** And would it surprise you -- so we talked about tranche  
12    two and we didn't quantify it, but the estimate was higher  
13    than what the actual costs incurred for tranche two were,  
14    right? Remember the 16 versus 17.9 -- point 16?

15    **A.** Yeah.

16    **Q.** Would it surprise you that just considering tranche one  
17    and tranche two, that the estimated costs were 15,921,000,  
18    and the actual costs were 900,000, less 15,000, 61,000,  
19    meaning that the actual costs to transition in excess of  
20    \$10 billion, State Street actually beat their pre-trade  
21    estimates? Would that surprise you?

22    **A.** No, it wouldn't surprise me, because the essence of a  
23    pre-trade estimate and the variability, the standard  
24    deviation that goes around that, is there's an equal  
25    probability that the outcome would be more or less than the

1 central case estimate. So I would not be surprised that the  
2 outcome would be better or more favorable than the pre-trade  
3 estimate.

4 **Q.** And you're not surprised, because -- I mean, it was a  
5 laborious exercise. We just went through the numbers and  
6 they did beat their pre-trade estimates, right?

7 **A.** Yeah. We didn't add the whole lot together, but the --  
8 for example, they didn't because of the opportunity costs,  
9 because of stocks not being available and so on. But  
10 ultimately, when we assessed all the factors, we were very  
11 satisfied with the outcome, yes.

12 **Q.** Incredibly complicated task to transition in excess of  
13 \$10 billion, right? Or 10 billion euros?

14 **A.** Yes. Though State Street just did 4.8 of that, but in  
15 total, 10 billion is a big number.

16 **Q.** 4.8 billion, incredibly complicated task, right? A lot  
17 of moving pieces, opportunity costs, market impact, trading  
18 stocks and bonds over the entire globe, right?

19 **A.** Yes, it's complicated.

20 **Q.** It's complicated. That's what State Street Bank Europe  
21 contracted with you to do, right?

22 **A.** They did.

23 **Q.** And in the end, they ended up beating, in terms of actual  
24 dollar for dollar, euro for euro, they beat what they had  
25 estimated would be the total cost for transitioning those

1 funds, right?

2 **A.** The -- the outcome was better, but there are market  
3 factors -- market conditions will drive those outcomes very  
4 significantly. And so the outcome was more favorable.

5 But -- and we were very satisfied. But it's market  
6 conditions, typically, that are significant drivers of the  
7 implementation shortfall outcomes.

8 **Q.** Okay. Now you testified that State Street was one of  
9 several transition managers on a panel, correct?

10 **A.** One of three.

11 **Q.** One of three. And NTMA, transition 14 was not the only  
12 transition State Street had submitted bids for, correct?

13 **A.** Well, they submitted bids for all of them, as far as I  
14 can remember.

15 **Q.** Right. 1 through 14, right?

16 **A.** Yes.

17 **Q.** And do you recall that in March of 2010, NTMA issued a  
18 request for proposals as to transition number 9?

19 **A.** We did that -- sorry. I don't know that it was in the  
20 date that you have mentioned, so -- but I do know that we did  
21 issue proposals for transition number 9, but I'm not sure of  
22 the date.

23 MR. GOLDSTEIN: Your Honor, may I approach just to  
24 make this quick?

25 THE COURT: Yes.

1 MR. GOLDSTEIN: Thank you.

2 THE COURT: Show Mr. Frank.

3 MR. GOLDSTEIN: I'm going to show him a bunch of  
4 e-mails just to refresh his memory as to the dates.

5 MR. FRANK: This is concerning number 10.

6 MR. GOLDSTEIN: Yeah, it's going to go 9 through  
7 14. You can look at those -- do you have any objection to me  
8 showing him those?

9 MR. FRANK: Not if you're just showing them to him.

10 BY MR. GOLDSTEIN:

11 **Q.** Mr. O'Callaghan, I'm showing you an e-mail and I just  
12 show it to you to refresh your recollection as to whether or  
13 not it refreshes your recollection that it was March 16,  
14 2010, when your request for tender went out as to transition  
15 number 9?

16 THE WITNESS: Yeah.

17 THE COURT: Just read it to yourself and then --

18 THE WITNESS: Sorry.

19 THE COURT: Look at it yourself and then the  
20 question is whether it refreshes your recollection.

21 THE WITNESS: Yup, that's -- yeah, I can recognize  
22 that e-mail, yeah.

23 BY MR. GOLDSTEIN:

24 **Q.** Okay. And do you recall that, in or about April of 2010,  
25 you notified State Street they had not been selected for

1 transition number 9?

2 **A.** No, I don't recall. Yeah.

3 **Q.** Look at the document. See if that refreshes your memory.

4 **A.** Yes, that was an e-mail from me advising them that they  
5 weren't successful, yes.

6 **Q.** And do you recall that, in or about May 28, 2010, a  
7 request for proposal went out as to transition number 10?

8 **A.** Well, subject to checking the date, but yeah.

9 MR. GOLDSTEIN: Perhaps the Government might just  
10 stipulate as to the dates, Your Honor, so that I need not.

11 MR. FRANK: I'm sorry, what are you asking?

12 MR. GOLDSTEIN: If the Government will stipulate as  
13 to the dates of these transitions, the tenders.

14 MR. FRANK: We have no objection to you  
15 representing what the dates are.

16 THE COURT: Fine.

17 THE WITNESS: Okay. Yeah.

18 BY MR. GOLDSTEIN:

19 **Q.** So at transition 10, the request for tender went out in  
20 May 28, 2010. Okay?

21 **A.** Okay.

22 **Q.** Do you recall that State Street was not selected for  
23 transition number 10?

24 **A.** Yeah. That's -- that's correct.

25 **Q.** And request for tender for transition number 11 went out

1 July 7, 2010. And once again, State Street was not selected  
2 for transition number 11, correct?

3 **A.** Yes.

4 **Q.** And July 15, 2010, a request for tender for transition  
5 number 12 went out, and once again, State Street was not  
6 selected, correct?

7 **A.** Yes.

8 **Q.** And do you recall that after transition number 12, after  
9 State Street, Mr. Pennings was -- his submission was not  
10 accepted in terms of transition number 12, Mr. Pennings asked  
11 for a meeting with yourself and Mr. Buckley?

12 **A.** Well, again, I remember meeting Mr. Pennings, but I don't  
13 remember the date. But if you say that's the date, that's  
14 probably correct.

15 MR. GOLDSTEIN: Your Honor, I'm going to move into  
16 evidence an e-mail to Mr. O'Callaghan dated August 4, 2010.  
17 I don't know if there's an objection or not.

18 MR. FRANK: No objection.

19 THE COURT: Admitted. So this will be 564.

20 (Exhibit No. 564 admitted into evidence.)

21 MR. GOLDSTEIN: May I have the Elmo, please.

22 I'm just going to give him a copy, in case he can't  
23 read that, Your Honor.

24 THE COURT: Fine.

25 BY MR. GOLDSTEIN:

1     **Q.** So if you take a look at that e-mail, Mr. O'Callaghan,  
2     this is an e-mail from Mr. Pennings after State Street was  
3     not selected for transition number 12, correct?

4     **A.** Yes, that's correct.

5     **Q.** Okay. And if I direct your attention to the bottom of  
6     that first page, there's an e-mail that begins, "Dear  
7     Killian," correct?

8     **A.** Yes.

9     **Q.** That's from Mr. Pennings, right?

10    **A.** Yes.

11    **Q.** Mr. Boomgaardt, Rick Boomgaardt is copied on that, or  
12    it's sent to him, actually, right?

13    **A.** Yes.

14    **Q.** Dated August 4, 2010, right?

15    **A.** Yes.

16    **Q.** And you're one of several people who are copied on that  
17    particular e-mail, right?

18    **A.** Yes.

19    **Q.** Subject is transition number 12, right?

20    **A.** Yes.

21    **Q.** Mr. Pennings writes, "Dear Killian, thank you for your  
22    note."

23                   And he's referring to the note on the preceding  
24    page alerting Mr. Pennings that State Street had not been  
25    selected for transition number 12, right?



1       **A.**   Yes.

2       **Q.**   He writes, "Clearly, we are, again, very disappointed  
3       with the outcome of the selection process for transitions 11  
4       and 12," right?

5       **A.**   Yes.

6       **Q.**   He writes, "We obviously seem to be missing a trick when  
7       communicating with NTMA, given that our market share on this  
8       limited panel is far below our overall market share in EMEA,  
9       as well as globally."

10               Right?

11       **A.**   Yes.

12       **Q.**   He continues to write "A lot of work" -- "a lot of  
13       work" -- the jury can't see it, anyway, "A lot of work goes  
14       into preparing these proposals, so we want to make every  
15       effort to ensure we deliver what you are expecting from us."

16               Right?

17       **A.**   Yes.

18       **Q.**   "I, therefore, would like to suggest a meeting with your  
19       team to have a frank and open discussion, feedback, session,  
20       to see what we can do, if anything, to improve our success  
21       rate with NTMA."

22               Right?

23       **A.**   Yes.

24       **Q.**   "So would a meeting at your office at 11:00 a.m. on  
25       either" several dates that he proposes, and asks you if any

1 of those dates would work, right?

2 **A.** Yes.

3 **Q.** He writes, "I would also like to take the opportunity to  
4 introduce Kevin O'Neill, ex-Nomura, and Ray Pestana, ex-Citi,  
5 who both joined our team in the past 12 months."

6 Right?

7 **A.** Yes.

8 **Q.** And that's customary, isn't it, that people in the  
9 banking sector will move from one particular transition  
10 manager to another? Is that familiar with your  
11 understanding?

12 **A.** That's pretty common.

13 **Q.** Okay. And so I presume you had a meeting with  
14 Mr. Pennings. Do you recall?

15 **A.** I can't recall specifically. I can recall in general  
16 that Mr. Pennings and -- was very keen to get feedback and  
17 you know, not just in a meeting, but we've had -- you know,  
18 there would have been phone conversations or whatever. And  
19 he was very keen to get feedback to -- and understand why  
20 State Street was not successful in a number of those tenders.

21 **Q.** And that was --

22 **A.** And he had less success than he would have anticipated.

23 **Q.** And he's asking you what trick they're missing, right?

24 **A.** That was his phrase. I wouldn't use that phrase.

25 It's -- you know, it's our evaluation criteria, with

1 predefined framework, and we evaluate everybody objectively  
2 against that. So I wouldn't use the word "trick." That's --  
3 I definitely wouldn't use that word.

4 **Q.** It's Mr. Pennings' word, right?

5 **A.** It's Mr. Pennings' word. Yes.

6 **Q.** To Mr. Buckley, correct?

7 **A.** Correct.

8 **Q.** And that was August 4, 2010, right?

9 **A.** Yes.

10 **Q.** Then October 18, 2010, transition number 13, the tender  
11 for transition number 13 came out. Do you recall that?

12 **A.** Well, again, I'm -- subject to the date being correct,  
13 yes.

14 **Q.** But there was a transition 13, correct?

15 **A.** There was, yes.

16 **Q.** And once again, State Street submitted a tender, correct?

17 **A.** Yeah. I assume so.

18 **Q.** And once again, State Street was not selected, correct?

19 **A.** Yes.

20 **Q.** And so do you recall that again, November 17, 2010,  
21 Mr. Pennings was again asking to have a meeting with  
22 Mr. Buckley?

23 **A.** Well, I expect that could have happened. I don't recall  
24 it specifically. But I have no reason to doubt that that  
25 would have happened.

1 MR. FRANK: Your Honor, can we have a sidebar?

2 THE COURT: Sure.

3 (The following discussion held at the bench.)

4 MR. FRANK: He's now been on cross for more than  
5 twice as long as he was on direct. We're well beyond the  
6 scope of the direct. I haven't objected to any of these  
7 questions, but I'm wondering where this is headed.

8 MR. GOLDSTEIN: I'm going through the process of  
9 selection, it's not beyond the scope. They're talking about  
10 State Street having bring on the panel, State Street having  
11 been selected to some transitions earlier.

12 That was a direct question asked by Mr. Frank. I'm  
13 showing that State Street was not selected in a whole series  
14 of transitions, leading up to transition number 14.

15 MR. JOHNSTON: You can ask it in like five  
16 questions, but I understand, there's a reason, a tactical  
17 reason, to delay this.

18 THE COURT: I'm glad you understand, Mr. Johnston.  
19 That's helpful.

20 So how much longer do you think you have?

21 MR. GOLDSTEIN: I'm going to ask to introduce this  
22 e-mail that shows that there was a meeting or a conversation,  
23 right before transition 14. And I think that's my last set  
24 of questions before me asking Mr. Weinberg --

25 MR. FRANK: Then we have no objection.

1 THE COURT: To that document?

2 MR. FRANK: I have no objection to that document.

3 THE COURT: Okay. Great.

4 MR. FRANK: Actually, you know what? I'm sorry. I  
5 do object to this document. This document didn't go to the  
6 witness.

7 THE COURT: Let me see.

8 What's the basis to -- the witness didn't get it.

9 MR. GOLDSTEIN: It's not for the truth -- I'll use  
10 it to refresh his memory as to whether or not he had a  
11 meeting around this time.

12 THE COURT: Fine.

13 (Bench conference concluded.)

14 BY MR. GOLDSTEIN:

15 **Q.** Mr. O'Callaghan, let me just quickly show you a document,  
16 see if this refreshes your recollection as to whether or not  
17 you had a telephone call with Mr. Pennings after State Street  
18 was not selected for transition 13, on or about  
19 November 17, 2010.

20 **A.** Yeah, I'm sure I did have that call, yeah.

21 **Q.** The point being, Mr. O'Callaghan, while you testified  
22 State Street had received some of the transitions or one or  
23 more of the transitions during your direct examination, the  
24 fact of the matter is, there was a whole sequence of  
25 transitions leading up to transition 14, where State Street

1 was not selected, correct?

2 **A.** That's correct.

3 **Q.** And Mr. Pennings was reaching out to Mr. Buckley and  
4 yourself, trying to figure out what State Street could do to  
5 start winning its fair share of transitions, correct?

6 **A.** Reaching out was -- would be typical of tenderers under  
7 procurement processes. Generally, unsuccessful tenderers who  
8 were looking to get feedback as to, you know, how they could  
9 be more successful at the next time, but he was doing -- he  
10 was doing that quite a lot.

11 **Q.** Right. I'm not suggesting that there was anything  
12 improper or unusual. It's just a fact that he was reaching  
13 out, asking what he was missing in terms of the selection  
14 process?

15 **A.** Yes, he was looking for feedback and -- yeah, exactly.  
16 And we were willing -- we were happy to provide feedback.

17 **Q.** And are you aware that the defense has been trying to  
18 obtain materials from the NTMA leading up to and before your  
19 testimony? Has anyone made you aware of that fact?

20 **A.** I have only a very general awareness of the issues. I  
21 haven't been involved in that discussion whatsoever.

22 **Q.** And what's your general awareness?

23 **A.** My general awareness is that there were -- there were  
24 discussions around the provision of documentation and the  
25 NTMA's chief legal officer on external counsel handled that

1 entirely. I wasn't involved in it. And the outcome, as I  
2 understand it, was that the documentation we provided was --  
3 which is available to the defense, was what we provided to  
4 the City of London Police, with all of the various appendices  
5 attaching to that.

6 **Q.** And none of the materials that you provided to the City  
7 of London Police were dated on or before, let's say,  
8 August of 2011?

9 MR. FRANK: Objection, misstates. And it's facts  
10 not in evidence.

11 THE COURT: If he knows. Overruled.

12 THE WITNESS: Well, there would have been like a  
13 transition management agreement in 2007, for example, which  
14 was part of what was provided. So there was some earlier  
15 documentation and so -- I may have been more specific --

16 BY MR. GOLDSTEIN:

17 **Q.** Fair enough. But the point is that you're aware the  
18 defendant was trying to obtain additional documents from the  
19 NTMA and there was a decision made by your legal counsel to  
20 not provide those materials to Mr. McLellan in advance or  
21 even now, while you're testifying, right?

22 **A.** Yeah, I'm just not sure. I personally don't know what  
23 materials were being sought, for example. I have no idea on  
24 it.

25 **Q.** But you're sure they weren't provided in response to

1 those requests, right?

2 **A.** My understanding is that they weren't provided. Yes.

3 MR. GOLDSTEIN: Nothing further.

4 THE COURT: Any redirect?

5 MR. FRANK: Yes, Your Honor. Briefly.

6 **REDIRECT EXAMINATION BY COUNSEL FOR PLAINTIFF**

7 BY MR. FRANK:

8 **Q.** Would you look at Exhibit 66-01, please, page 9.

9 MR. FRANK: If you could blow up that chart.

10 BY MR. FRANK:

11 **Q.** Mr. O'Callaghan, you were asked some questions on  
12 cross-examination about your criteria for your award  
13 selection process?

14 **A.** Yes.

15 **Q.** And you were asked some questions about the 10 percent  
16 weighting you give to fees that's part of that -- part of  
17 those criteria?

18 **A.** Yes.

19 **Q.** And then counsel asked -- and then you indicated that the  
20 fees were double counted, because they're also included in  
21 the implementation shortfall, correct?

22 **A.** Yes.

23 **Q.** Counsel indicated he would come back to that?

24 **A.** Sorry?

25 **Q.** Counsel indicated he would come back to that?



1       **A.** Yes.

2       **Q.** He didn't, did he?

3       **A.** No, I don't think so. No.

4       **Q.** But, in fact, part of that criteria -- one of the factors  
5 in implementation shortfall is fees, correct?

6       **A.** Yes.

7       **Q.** So what is -- if you include fees in both of those  
8 categories, how much do they play into your overall analysis?

9               MR. GOLDSTEIN: I object to the characterization,  
10 Your Honor.

11              MR. FRANK: The question is how much do they play  
12 into your overall analysis.

13              THE COURT: How much does what play in?

14              MR. FRANK: Fees.

15              THE COURT: He can ask him how much fees play into  
16 the overall analysis. Overruled.

17              THE WITNESS: So the fees are -- the 10 percent for  
18 fees, they play directly into that. Fees would typically be  
19 a relatively small part of the 20 percent, so they would be  
20 the entirety of the 10 percent, and a small portion of the  
21 20 percent.

22       BY MR. FRANK:

23       **Q.** And in this instance, would knowing what State Street  
24 actually charged, had it affected the outcome had you known  
25 it when awarding the transition?

1     **A.** Almost certainly it would and -- because Nomura and State  
2     Street had very similar scores and Nomura had ten on fees,  
3     and State Street had 9.7, and Citibank was some distance  
4     behind. And we decided to split the award, because the two  
5     scores were very similar. So if State Street's very high fee  
6     had been included, then their score out of ten would have  
7     dropped down to about two, so they would have fallen out of  
8     the running, so we would almost certainly have awarded the  
9     full transition to Nomura, if we had known in advance.

10           MR. FRANK: Can we look at Exhibit 70.1, please.  
11     This is the pre-trade -- I'm sorry, the proposal that counsel  
12     showed you.

13           THE WITNESS: Yes.

14           MR. FRANK: If we look at page 9, please. And if  
15     we blow up that chart.

16           MS. LEAHY: Top one?

17           MR. FRANK: Yes, please.

18     BY MR. FRANK:

19     **Q.** You were asked some questions about the equity bid-ask  
20     spread component?

21     **A.** Yup.

22     **Q.** Did you understand that to be a market cost?

23           MR. GOLDSTEIN: Well, I object to the leading  
24     nature of the examination.

25           THE COURT: Let me hear the question, first.

1 BY MR. FRANK:

2 **Q.** Did you understand that to be a market cost, or a  
3 remuneration to State Street?

4 THE WITNESS: Okay to answer?

5 THE COURT: You can answer. Sorry, yes.

6 THE WITNESS: That's a market cost, in my  
7 understanding.

8 MR. FRANK: Thank you. If we could look at  
9 Exhibit 138, please. And if you could go to page 6 of the  
10 attachment, I'm sorry, 138 attachment. I'm sorry, the next  
11 page and if we could blow up the chart on the right.

12 BY MR. FRANK:

13 **Q.** You were asked some questions about those commission  
14 costs?

15 **A.** Yes.

16 **Q.** Did you understand those to be commission costs incurring  
17 to State Street, or to third-party brokers?

18 **A.** To third-party brokers.

19 **Q.** And d you recall -- what, if anything, do you recall  
20 about a communication with State Street about whether it was  
21 absorbing the cost of third-party brokerage charges into its  
22 management fee?

23 **A.** Well, my understanding was that we wouldn't -- we  
24 wouldn't be paying any trading costs. That's my recall, or  
25 commission costs, I should say.

1 Q. And you were asked some questions about -- well,  
2 actually, if we could look at Exhibit 170.1, please. And if  
3 we could look at page 7. And again --

4 MR. FRANK: Erin, if you could just blow up that  
5 bottom right.

6 BY MR. FRANK:

7 Q. You were asked some questions about various lines here,  
8 bid-ask spread, market impact, and opportunity costs?

9 Do you recall --

10 A. Yes, what tranche is this? Sorry.

11 Q. I believe this is the final post trade?

12 A. Yeah, okay.

13 Q. Do you recall those questions?

14 A. Yes.

15 Q. Do you know where in this analysis State Street hid the  
16 commissions that they charged you?

17 MR. GOLDSTEIN: I object.

18 THE COURT: Sustained as to the form.

19 BY MR. FRANK:

20 Q. Do you know where those commissions are included in this  
21 analysis?

22 A. No, I don't.

23 Q. Could be any one of those lines?

24 A. I -- I don't know. I don't know what happened within  
25 State Street.

1     **Q.** And you were asked some questions about that opportunity  
2     cost. Do you see that?

3     **A.** Yes.

4     **Q.** Do you have an understanding of whether that number would  
5     have been different, if State Street had not helped itself to  
6     3.2 million euros in --

7             MR. GOLDSTEIN: Objection.

8             THE COURT: Sustained as to the form.

9     BY MR. FRANK:

10    **Q.** Do you have an understanding of whether any of these  
11    numbers could have been different if you hadn't been charged  
12    that 3.2 million euros?

13    **A.** Yeah, the bottom number, the 14.3 million number would  
14    have been different, the total number, but I don't know which  
15    element of the breakdown would have been affected.

16    **Q.** Would have been by 3.2 million euros of that 14 million?

17    **A.** Well, that was tranche number three, but in principal,  
18    the 3.2 million would have come out of the total costs in  
19    whatever tranches they were, they were improperly deducted.

20    **Q.** And counsel asked you some questions about State Street's  
21    overall performance and the fact that they beat the pre-trade  
22    estimate?

23    **A.** Yes.

24    **Q.** What's your understanding of how they would have  
25    performed --

1     **A.**   Sorry, they --

2     **Q.**   Sorry?

3     **A.**   They didn't -- we were very satisfied, what the  
4     opportunity cost here was significant, but that was due to  
5     our -- our issue. So they didn't beat the pre-trade estimate  
6     on tranche three by a significant amount, but that was --  
7     that was down to us.

8     **Q.**   Well, they told you that it was due to those issues,  
9     correct?

10                 MR. GOLDSTEIN: Well, I object.

11                 THE COURT: Sustained.

12     BY MR. FRANK:

13     **Q.**   Overall, they beat the pre-trade estimate. Was that your  
14     understanding?

15     **A.**   We were very satisfied with the outcome. I would just  
16     need to add up the numbers. I'm not sure if the aggregate,  
17     if they beat them or not. But if any deficiency, we were  
18     very happy, very satisfied that State Street did a great job  
19     and it was down to -- the deficiency was down to problems on  
20     our side, or any underperformance against the pre-trade was  
21     due to issues on our side.

22     **Q.**   And what is your understanding of what the performance  
23     would have been like if you hadn't been charged that  
24     3.2 million euros?

25     **A.**   It would have been 3.2 euros better than we would have --

1 and we would have all been in 3.2 million more.

2 **Q.** And when a transition manager acting as your agent  
3 outperforms its pre-trade estimate, what is your  
4 understanding of who is entitled to the benefit of that  
5 outperformance?

6 **A.** We're absolutely entitled to it. They're operating on an  
7 agency basis and we take all the risk and obtain all the  
8 return.

9 **Q.** And what's your understanding of who bears the cost of  
10 underperformance?

11 **A.** We certainly bear the cost of underperformance.

12 **Q.** And in fact, to the extent that they underperformed on  
13 one of those tranches, did State Street offer to compensate  
14 you for that?

15 MR. GOLDSTEIN: I object.

16 THE COURT: Sustained as to the form.

17 BY MR. FRANK:

18 **Q.** What, if anything, did State Street offer to do when they  
19 underperformed?

20 **A.** In relation to trading, on the performance, nothing.  
21 That was the outcome that they had to bear the only offer  
22 they made was in relation to -- or the only recompense was in  
23 relation --

24 THE COURT: That answers the question.

25 THE WITNESS: -- to the improper --

1 MR. FRANK: That's fine.

2 THE WITNESS: Okay. Sorry.

3 BY MR. FRANK:

4 Q. Could we take a look at Exhibit 99-1, please. And if we  
5 could look at the third page.

6 You were asked some questions about your master  
7 transition services agreement?

8 A. Yes.

9 Q. And you were asked some questions about whether it's  
10 governed under Irish law?

11 A. Yes.

12 Q. Where did the US --

13 MR. GOLDSTEIN: That's incorrect, I think. The  
14 cover sheet references Ireland law. Not this.

15 MR. FRANK: No, the agreement references it, as  
16 well. I can refresh the -- can we go to the last page? No,  
17 not that last page. If you can just move earlier, please.  
18 Before the schedules.

19 BY MR. FRANK:

20 Q. There, governing law. That provision says that the  
21 agreement is governed under Irish law, correct?

22 A. Yes.

23 Q. Where did the US stocks that you sold trade? In what  
24 country did they trade?

25 MR. GOLDSTEIN: Foundation, Your Honor. I object.



1 THE COURT: Sustained as to the form.

2 BY MR. FRANK:

3 Q. Do you know where the US stocks that you sold traded?

4 A. They would have traded on US exchanges.

5 Q. And do you know what law applies in the United States?

6 A. The United States law.

7 Q. Could we look at --

8 MR. FRANK: I'm not sure of the page number, Erin,  
9 but if you go earlier to provision.

10 BY MR. FRANK:

11 Q. You were asked about provisions 9.1 and 12.1, do you  
12 recall that?

13 A. 9.1 was about --

14 Q. The financial services authority?

15 A. Yes.

16 Q. And then you were asked about 12.1. Do you recall that?

17 A. Yeah. Excuse me, yes.

18 Q. I'd like to show you provision 6.2.

19 "In respect of services for which the transition  
20 manager has been appointed pursuant to the tender procedure,  
21 the transition manager agrees that it shall, at all times,  
22 act in good faith."

23 Do you see that?

24 A. Yes.

25 Q. What is your understanding of whether that happened here?

1 MR. GOLDSTEIN: I object, Your Honor.

2 THE COURT: Overruled.

3 BY MR. FRANK:

4 Q. What is your understanding of whether State Street acted  
5 in good faith with respect to --

6 THE COURT: Based on your personal knowledge.

7 BY MR. FRANK:

8 Q. -- with respect to the services it provided to you?

9 THE WITNESS: So, sorry.

10 THE COURT: Based on your personal knowledge.

11 THE WITNESS: Yeah, based on my personal knowledge,  
12 there were improper commissions deducted, and that's  
13 definitely not in good faith.

14 MR. FRANK: Thank you, no further questions.

15 MR. GOLDSTEIN: Can you leave that up, please?  
16 Sorry.

17 **RECROSS-EXAMINATION BY COUNSEL FOR DEFENDANT**

18 BY MR. GOLDSTEIN:

19 Q. Who is the transition manager identified in the contract?  
20 It's State Street Bank Europe Limited, right?

21 A. Yes.

22 Q. And Mr. Frank asked you a question regarding  
23 Exhibit 70.1, which was the tender, the proposal that had a  
24 bid offer line item. Do you recall that line of questioning,  
25 about bid-ask spread?

1       **A.**   Yeah.

2       **Q.**   And they also showed you the bid-ask spread in  
3       Document 170, right. And when he asked you the question as  
4       to Exhibit 70, he asked you what -- strike that.

5               The bid offer spread, you identified it as being a  
6       market cost, right?

7       **A.**   Yeah.

8       **Q.**   It's a market cost associated with broker-dealer  
9       services, right?

10      **A.**   Correct.

11      **Q.**   And so the entries for 3 million or 5 million for bid-ask  
12      spread, if State Street had used an external broker-dealer,  
13      rather than an affiliate broker-dealer. For example, if  
14      State Street Bank Europe Limited gave the execution services  
15      to Goldman Sachs, Goldman Sachs bid offer, the prices they  
16      charged for execution services would be within that bid offer  
17      spread line item, correct?

18              MR. FRANK: Objection. Foundation to what Goldman  
19      Sachs would have done.

20              THE COURT: If you know. Overruled. You can  
21      answer, if you know.

22              THE WITNESS: Sorry, can you repeat the question?  
23      Sorry.

24      BY MR. GOLDSTEIN:

25      **Q.**   Sure. Bid offer spread line item reflects execution

1 services, costs imposed for execution services by  
2 broker-dealers, right?

3 **A.** Yes. It's the difference between the price that one  
4 might be able to buy at and sell at.

5 **Q.** Right. So when a broker-dealer goes to the marketplace  
6 to execute transactions there's markups and markdowns  
7 involved with those services, right?

8 **A.** Uh-huh.

9 **Q.** And that's what's reflected in the line item bid offer  
10 spread, bid-ask spread in the pre-trades and in the post  
11 trades, right?

12 **A.** Yes.

13 **Q.** And so if State Street Bank Europe Limited had selected  
14 Goldman Sachs, or Citibank, or some other broker-dealer,  
15 other than State Street Bank Europe Limited's affiliate,  
16 there would still be bid-ask spread costs within the  
17 pre-trade and the post trade, right?

18 MR. FRANK: Objection to the hypothetical, Your  
19 Honor.

20 THE COURT: Overruled.

21 BY MR. GOLDSTEIN:

22 **Q.** Correct?

23 **A.** There would be bid-ask spreads incurred, right.

24 **Q.** Right. It's just a cost of execution performed by  
25 broker-dealers, which is a necessary component of conducting

1 a transition, correct?

2 **A.** In the marketplace, yeah.

3 MR. GOLDSTEIN: In the marketplace. Thank you.  
4 Nothing further.

5 THE COURT: You're excused, sir. Thank you very  
6 much for your testimony.

7 MR. FRANK: The Government rests, Your Honor.

8 THE COURT: All right.

9 MR. JOHNSTON: Well, wait. No.

10 MR. FRANK: I'm sorry. One second.

11 MR. JOHNSTON: We need the break to work out --  
12 make sure that we're on the same page in terms of exhibits  
13 before we rest.

14 THE COURT: All right.

15 You agree with that?

16 MR. FRANK: I do agree with that, Your Honor. My  
17 dramatic moment has been stolen from me.

18 THE COURT: Yes.

19 So ladies and gentlemen, what we're going to do --  
20 so let me just explain what that means. The Government is  
21 done with its witnesses. What they want to do is simply  
22 review the exhibits to make sure that all the ones that  
23 they -- as you know, there's been a lot of exhibits and just  
24 compare the list to make sure all the ones they think they've  
25 offered that have been admitted and, in fact, have been, and

1 to make sure we're all on the same page with that.

2 So we'll do that, but -- with Mr. Frank's  
3 statement, withdrawn, but essentially stated, is that there  
4 aren't any more witnesses from the Government. They've  
5 concluded their presentation of the evidence. So we're going  
6 to take the break now. We'll sort out if there are any  
7 issues about exhibits, we'll come back.

8 If there are other exhibits to be introduced, that  
9 will happen not when you're out in the back, but that will  
10 happen in front of you. They're just going to take a few  
11 minutes to go over their list, then the Government will rest,  
12 and then we'll turn to see what, if any, evidence the defense  
13 wants to present.

14 All right. All rise for the jury.

15 (The jury exits the courtroom.)

16 THE COURT: Do you want a couple minutes just to go  
17 over the list among yourselves?

18 MR. JOHNSTON: Yeah, we'll need to do it with  
19 Maria, as well.

20 THE COURT: Fine. Why don't you do that and then  
21 I'm happy to -- and then I'll come back and I'll hear, if it  
22 works for both of you. What makes the most sense to me, is  
23 even though the Government has -- once we solve what these  
24 are, you can make your -- whatever motions you want to make,  
25 whatever arguments you want to make.

1           And then when the jury comes back in, if there are  
2 more to admit or not. But if there are more to admit, we'll  
3 deal with that. Then you can rest in front of the jury and  
4 then you can -- I will acknowledge that all of the arguments  
5 that you made during the break are applied then and whatever  
6 rulings I made then and we won't have to redo it, if that's  
7 agreeable to both of you.

8           MR. WEINBERG: Thank you, Your Honor.

9           THE COURT: All right. Fine. So how long do you  
10 want to -- before I come back?

11          MR. JOHNSTON: Ten minutes?

12          THE COURT: Fine. I'll be back in ten minutes.

13          (Court in recess at 11:00 a.m.

14          and reconvened at 11:35 a.m.)

15          THE COURT: Please be seated. Where are we?

16          He stole your dramatic moment and then he just  
17 departed.

18          MR. FRANK: The two people with the relevant  
19 knowledge have just left. None of us were involved in these  
20 discussions, Your Honor.

21          MR. WEINBERG: We had the good grace to be able to  
22 go to the men's room before the discussion.

23          THE COURT: Does one of you want to go out in the  
24 hallway and see where they are?

25          MR. FRANK: Your Honor, just a minor point. I

1 don't know what the court's practice is with respect to  
2 expert witnesses, but we would request that the word "expert"  
3 not be used. We have no objection to establishing his  
4 qualifications and establishing that he's offering opinion  
5 testimony pursuant to Rule 702, but we do have an objection  
6 to him being designated with the word "expert" in front of  
7 the jury.

8 THE COURT: What do you want?

9 MR. WEINBERG: I never heard of that objection  
10 before. I have no objection to not using the word "expert"  
11 before he is asked for expert testimony, but I do intend on  
12 final argument to tell the jury they had an authentic expert  
13 tell them X, Y, and Z.

14 THE COURT: What is the basis for the objection?

15 MR. FRANK: 403, Your Honor.

16 THE COURT: Overruled.

17 Do we need -- I know him only by the name "Max."  
18 Who do we need on your side?

19 MR. WEINBERG: I'm sure he's just in the men's room  
20 and Mr. Goldstein will have him back in 30 seconds.

21 THE COURT: Okay. So where are we in terms of the  
22 exhibits?

23 MR. JOHNSTON: We're all squared away. When the  
24 jury is back in, we're just going to read for the court  
25 reporter a number of exhibits just to make sure that we had



1 it in our records that they were admitted, but they --

2 THE COURT: Ms. Simeone didn't have them. So you  
3 have some number that you both agree are in evidence;  
4 Ms. Simeone's list doesn't list them as in evidence.  
5 Nobody's gone back, obviously, which is fine, to the  
6 transcript to see, but you all agree they're in, So you're  
7 just, when they come in, are going to say Exhibit 1 to  
8 whatever --

9 MR. JOHNSTON: I'm going to read off a list of  
10 exhibits.

11 THE COURT: Fine. Okay. You agree with that?

12 MR. WEINBERG: Yes, Your Honor.

13 THE COURT: Okay.

14 MR. JOHNSTON: I guess we can or cannot do that in  
15 front of a jury, I guess. Doesn't matter.

16 MR. FRANK: I have no objection to doing it right  
17 now.

18 THE COURT: Fine. Let's just do it right now and  
19 I'll tell them we did it.

20 MR. JOHNSTON: Sure. Just for the record, the  
21 parties agree that these exhibits have been admitted into  
22 evidence: 11-1, 46-1, 50-1, 68, 91-1, 91-2, 91-3, 115-1,  
23 115-2, 130-1, 123, 135-1, 143-1, 172-1, 178-1. That's it.

24 (Exhibit Nos. 11-1, 46-1, 50-1, 68, 91-1, 91-2,  
25 91-3, 115-1, 115-2, 130-1, 123, 135-1, 143-1,

1 172-1, and 178-1 admitted into evidence.)

2 THE COURT: Do you agree with that?

3 MR. GOLDSTEIN: Yes, Your Honor.

4 THE COURT: All right. Those are in evidence. So  
5 that -- when the jury comes out, I'm going to tell them that  
6 there were just a number of exhibits. And to speed things  
7 up, we just read them in here, but they're in evidence and  
8 they'll have them within the jury room.

9 So when they come back, you're going to rest,  
10 Mr. Frank; is that right?

11 MR. FRANK: Yes, Your Honor.

12 THE COURT: So why don't you make whatever motions  
13 you want to make when Mr. Frank rests now, and I will treat  
14 them as if made after Mr. Frank says he rests, and whatever I  
15 rule will apply then.

16 MR. WEINBERG: Thank you, Your Honor. I've given  
17 to Mr. Frank about two minutes ago copies of the motions,  
18 hard copy. We'll file them electronically. There are three  
19 motions. I don't know that all of them need to be addressed  
20 right now. The most important one of course is the motion  
21 for judgment of acquittal.

22 THE COURT: I have three documents. I just want to  
23 make sure. One is supplemental request for instruction to  
24 the jury. I don't need to resolve that right now.

25 MR. FRANK: You don't.

1 THE COURT: The second is motion to preclude expert  
2 testimony from Graham Dixon. I don't have to approve of that  
3 at the moment. And then I have one motion for judgment of  
4 acquittal and incorporated memo of law. That's the issue.

5 MR. WEINBERG: Yes, Your Honor. I'm content if  
6 Your Honor would prefer argument on all but one of the counts  
7 after the jury leaves today.

8 THE COURT: All right.

9 MR. WEINBERG: But I do ask the court because, to  
10 drop back, we vigorously contested the joinder of the AXA  
11 account to the preexisting European counts. The Government  
12 made representations that succeeded in persuading Your Honor  
13 to join the counts, largely based on a contention of  
14 overlapping evidence.

15 I don't believe the evidence has demonstrated such  
16 an overlap. I believe we've been prejudiced by the joinder.  
17 But I also most strongly believe that the count, which is a  
18 wire fraud count dating to February 24, has been utterly  
19 unproven.

20 The evidence as to February 24 -- first of all, I  
21 think that the AXA alleged fraud has been proven as a  
22 generality. But even drilling down to what the government  
23 did or did not allege and prove, they alleged a certain wire.  
24 They exempted AXA from the conspiracy. That wire was a  
25 pre-trade sent from Ms. Morris at State Street to a number of

1 people on February 24, including AXA. It did contain within  
2 the documents a statement that the commission would be, you  
3 know, based on .1 basis point yield. The commission turned  
4 out later in March, several weeks later, to be something  
5 other than that.

6 Mr. McLellan was one of a number of people that  
7 passively received that. There isn't any evidence from  
8 Ms. Morris, who was the only one of two witnesses, and  
9 Mr. Clemmenson, who was the other witness, that Mr. McLellan  
10 had any participatory role in the setting of the commission,  
11 in the including of the commission in this pre-trade. There  
12 was no absolutely no evidence he read this pre-trade.  
13 There's no evidence he was a decisionmaker before the  
14 pre-trade, that he directed or caused the pre-trade to be  
15 written in this manner.

16 There were two different people between Ms. Morris  
17 and Mr. McLellan, that being Mr. Walker and Mr. Weiner.  
18 Anybody could have discussed with Ms. Morris. She didn't  
19 testify that Mr. McLellan participated in setting the  
20 condition. Didn't testify that Mr. McLellan participated in  
21 drafting, reviewing, editing, authoring this pre-trade. And  
22 there's no evidence in the record he read it.

23 This is the wire fraud that's charged individually  
24 against Mr. McLellan. There's no Pinkerton option here.  
25 Either he did it or he caused it, and the evidence is

1 completely lacking as to any.

2 The evidence is completely consistent that at least  
3 a week later Mr. McLellan was on an email with a lawyer for  
4 State Street Global Advisors, Mr. Deal and others, and they  
5 were talking about needing to certify a certain price and  
6 that the price needed to be fair and reasonable.

7 The tape recording that the government played on  
8 March 2 was an open discussion with Mr. McLellan, setting  
9 different terms for trading. He asked during the tape:  
10 Anybody have any questions, comments? And they talked about  
11 scheduling. Nobody said to Mr. McLellan: Don't you  
12 remember, Ross, you okayed a pre-trade at a different basis  
13 point?

14 THE COURT: So this argument is essentially there's  
15 no evidence that he set up the deal at .1 prior to the  
16 February 24th email. Therefore there's no basis to infer he  
17 caused it.

18 MR. WEINBERG: Yes, Your Honor.

19 THE COURT: What do you say about that, Mr. Frank?

20 MR. WEINBERG: There's plenty of evidence of that,  
21 Your Honor. First of all, he told Ed Pennings he'd charge  
22 hidden commissions on the AXA deal. That's in evidence.

23 Second of all, we introduced in evidence an email  
24 when the deal was first -- the opportunity was first  
25 presented to State Street where the defendant said to Kevin

1 Walker: Let's chase this.

2 There was evidence of numerous emails that he was  
3 on regarding AXA, including the one that's alleged to be in  
4 furtherance of the fraud as the specific wire, which is the  
5 pre-trade on which he was copied. He personally directed the  
6 traders what to do.

7 THE COURT: You're talking about prior? I think  
8 his theory is, if I understand it correctly, that whether or  
9 not -- putting aside the question whether later a fraud  
10 occurred, he's saying that for your Count 6, you need to show  
11 that Mr. McLellan caused the February 24 email to be sent  
12 based on the allegations in the indictment, that being the  
13 transmission.

14 And he's saying he didn't send the email. That  
15 seems clear. Or he could have caused it. And he's saying  
16 there's an absence of evidence that on or before February 24  
17 he did things that caused that email to be sent.

18 MR. WEINBERG: Or if I could just have the  
19 corollary that he in February 24 had any knowledge that later  
20 AXA would be charged a different price, that there was any  
21 intent to deceive when they set this commission.

22 THE COURT: I see. Even if he caused it, there  
23 wasn't yet any fraud.

24 MR. WEINBERG: They could have decided a week  
25 later, with all these lawyers saying we have to certify a

1 price, to set a price. And he could have told Pennings two  
2 months later things that had no basis before February 24.

3 THE COURT: As to the first point, just the --  
4 what's the evidence that on or before the 24th his  
5 involvement including the price?

6 MR. FRANK: On or before that date, he said, Let's  
7 chase this, to Kevin Walker, who's the frontline salesperson.  
8 There's been evidence that he doesn't interact with customers  
9 directly, although he did in this particular case, but that  
10 they have salespeople do that interaction.

11 There's also evidence he specifically interacted  
12 before February 24. We have AXA. There was an email  
13 introduced into evidence that referenced a phone call between  
14 Jim Kelly and the defendant directly.

15 There's also been evidence that -- it's in evidence  
16 that he signed the compliance certification on February 23  
17 that was sent to AXA. He personally signed it.

18 There's been extensive evidence that he directed  
19 every aspect of this trade.

20 THE COURT: All right.

21 MR. WEINBERG: Judge, if I can just rejoin -- I  
22 know you want to get to the jury -- as to why seeking a deal  
23 does not mean that on February 24 beforehand he had any  
24 criminal intent or any participation in setting a rate.  
25 Telling Walker to go chase the deal does not mean that on

1 February 24 that he gave them a price that he didn't intend  
2 to be the price, if in fact he had any knowledge of it.

3 THE COURT: Right. But what I'm deciding here is  
4 not whether that single email is proof beyond a reasonable  
5 doubt of criminal intent, but whether, given what Mr. Frank  
6 has described, whether Mr. McLellan's -- facts that a jury  
7 could conclude, from which a jury could conclude his  
8 involvement in the deal, whether the jury could also infer  
9 that as of February 24 he had a fraudulent intent, and that  
10 determination they could make on a variety of evidence.

11 And so I think on the totality of the evidence  
12 before me, which I think the standard -- correct me if I'm  
13 wrong -- is I'd have to find that no reasonable jury could  
14 conclude that Mr. McLellan committed this offense, in order  
15 to allow a Rule 29.

16 MR. WEINBERG: Based on non-speculative evidence,  
17 Your Honor would have to believe that there was a fair basis  
18 in the evidence that there was a scheme to defraud AXA that  
19 preexisted the sending of a wire. A wire sent before the  
20 scheme commenced cannot further the scheme.

21 There's no evidence -- the only evidence is Ross  
22 says to Walker, Good deal. Go chase it. That's one.

23 Two, he certifies something to AXA that has nothing  
24 to do with pricing or pretrades. It's a nondisclosure of  
25 some sort.



1 I can go back to February 23. There's no evidence  
2 from Kelly they spoke about the terms or conditions. Kelly  
3 didn't have any recollection of any specific conversation  
4 with Mr. McLellan.

5 There's nothing in this record to reflect that the  
6 existence, planning, decision to charge AXA something other  
7 than what was in the February 24 pretrade had been made, and  
8 there's no evidence other than his receiving a 40-page  
9 document that he knew it, focused on it, directed it, caused  
10 it, read it.

11 But even taking that aside, if that could be argued  
12 to be a closer call -- it's not a close call, respectfully --  
13 is that there was a scheme to defraud AXA that was in  
14 existence on February 24. And therefore the wire is not in  
15 furtherance of a scheme to defraud.

16 And Your Honor should, you know, respectfully,  
17 grant a judgment of acquittal.

18 THE COURT: You're always respectful, Mr. Weinberg.

19 MR. WEINBERG: Huh?

20 THE COURT: You're always respectful.

21 MR. WEINBERG: Thank you.

22 But I'm anxious not to have to defend the AXA  
23 charge, which I believe shouldn't have been joined with the  
24 other charges. And that's why I'm pushing Your Honor not to  
25 defer but to consider it, whether it's now at this break or

1 at 1:00.

2 THE COURT: I understand why you want me to rule.  
3 I'm at the moment not persuaded that I should allow a Rule 29  
4 motion on Count 6. If you want to argue it more after the  
5 break, after 1:00, I'm fine to do that.

6 Before I just go get the jury, so you're going to  
7 rest. I'll tell them about the other exhibits, and then  
8 you're going to call Mr. --

9 MR. WEINBERG: Marc Menchel will be the first  
10 witness.

11 THE COURT: How many was it, Mr. Johnston? Ten?

12 MR. JOHNSTON: Ten what?

13 THE COURT: Ten exhibits you read in.

14 MR. JOHNSTON: Do you want an approximate number?

15 MR. GOLDSTEIN: 15.

16 THE COURT: 15. Okay.

17 (Jury entered the courtroom.)

18 THE COURT: So, ladies and gentlemen, let me update  
19 you where we are. During the break, we did a couple of  
20 things. One was the lawyers went over all the exhibits that  
21 have been offered and discussed and identified approximately  
22 15 that they agree are or should be in evidence. And they  
23 just read the list in while you were out on the break. It  
24 just seemed faster and simpler rather than have you sit here  
25 and listen to them read a list of numbers. It's by

1 agreement. You'll have those. There's no difference in  
2 those and any others. You'll have all the exhibits that are  
3 in evidence when you go back to retire to deliberate.

4 We also made the arrangements to shift from the  
5 government presenting evidence to the defense. So it took a  
6 few moments.

7 MR. FRANK: Thank you, Your Honor. The government  
8 rests.

9 THE COURT: All right. So that means that's the  
10 formal and dramatic, now, conclusion to the government's  
11 case.

12 MR. GOLDSTEIN: Defense calls Marc Menchel.

13 THE COURT: So you've been used to the government  
14 asking non-leading questions and the defense asking leading  
15 questions because that's how it goes, generally, when a  
16 lawyer calls a witness.

17 Now the roles are reversed because now the defense  
18 is presenting evidence, so they will be asking non-leading  
19 questions, except on preliminary matters, and the government  
20 will be cross-examining the witnesses, so as a general matter  
21 they're entitled to ask leading questions.

22 MR. WEINBERG: Judge, may we reserve the issues  
23 that were raised in the motion?

24 THE COURT: Yes. Thank you. They are reserved.

25 MR. WEINBERG: Thank you.

1 (The witness was duly sworn.)

2 THE COURT: Please be seated.

3 Go ahead, Mr. Goldstein.

4 MR. GOLDSTEIN: Thank you, Your Honor.

5 **MARC MENCHEL**

6 having been duly sworn, testified as follows:

7 **DIRECT EXAMINATION BY COUNSEL FOR DEFENDANT**

8 BY MR. GOLDSTEIN:

9 **Q.** Please state your name and spell your last name for the  
10 record.

11 **A.** Sure. My name is Marc Menchel, M-e-n-c-h-e-l.

12 **Q.** Mr. Menchel, just pull the microphone a little bit closer  
13 so everyone can hear you. There's water to your right.

14 Where do you currently work, sir?

15 **A.** I'm self-employed. I'm my own consultancy, Menchel  
16 Consultancy.

17 **Q.** What do you do at Menchel Consulting?

18 **A.** I consult on broker-dealer matters and financial matters  
19 generally.

20 **Q.** And before that, what did you do?

21 **A.** I was a general counsel of FINRA.

22 **Q.** And what is FINRA?

23 **A.** FINRA, which was formerly known as the National  
24 Association of Security Dealers, is a national securities  
25 association.

1           So it's a little arcane to explain, but the way  
2       regulation works in this country is every broker-dealer that  
3       does business off the exchange -- there are broker-dealers  
4       who only deal on an exchange. But any broker-dealer who does  
5       business off an exchange, so any broker-dealer that has  
6       customers, for example, has to join a national security  
7       association. There could be --

8       **Q.** Mr. Menchel, what does FINRA stand for?

9       **A.** That's a good question.

10      **Q.** It has been some time.

11      **A.** It has been some time. I don't remember really what the  
12      acronym is.

13      **Q.** All right. It's an organization doing -- what was your  
14      position there?

15      **A.** General counsel.

16      **Q.** Okay. And what did you -- what was your day-to-day at  
17      FINRA? First, how long did you work there, sir?

18      **A.** Ten years.

19      **Q.** And what years were they?

20      **A.** I worked there from 2002 to 2012.

21      **Q.** Okay. And as general counsel, what was your  
22      responsibility and role there?

23      **A.** So I was in charge of the regulatory process, and it was  
24      three main things. We wrote every rule filing that went to  
25      the SEC. And so FINRA makes rules that have to be blessed by

1 the SEC. There is a disciplinary process at FINRA. And  
2 after a hearing, when that goes to appeal, my group was  
3 counsel to the NAC, the National Adjudicatory Counsel. And  
4 also we were counsel to the operating units of the  
5 organization.

6 So there was enforcement, there was market  
7 regulation, and there was market -- sorry -- and then there  
8 was also our markets practice.

9 **Q.** Okay. And how many people were working with you at FINRA  
10 during your ten years there?

11 **A.** Between 40 and 50.

12 **Q.** And how many lawyers were there?

13 **A.** About half of that was lawyers.

14 **Q.** And what was your role in relation to that staff of  
15 lawyers?

16 **A.** So I was the general counsel, and they all reported to  
17 me.

18 **Q.** Okay. And where were you located when you were working  
19 with FINRA?

20 **A.** I was in Washington, D.C.

21 **Q.** All right. And explain FINRA's role in terms of the  
22 regulation or overseeing of a broker-dealer.

23 **A.** Okay. So FINRA, which I now remember is Financial  
24 Industry Regulatory Association.

25 As I was beginning to explain before, every

1 broker-dealer that does business off-exchange, so every  
2 broker-dealer that does business with a customer, has to join  
3 a national securities association. Doesn't have to join an  
4 exchange. Has to join a national securities association.  
5 FINRA happens to be the only national securities association.

6 **Q.** Okay. So what does that mean in terms of FINRA's  
7 interaction with the broker-dealers?

8 **A.** That means every broker-dealer basically in the country  
9 has to be a member and they're overseen by FINRA. They have  
10 to follow FINRA rules and they are subject to FINRA's  
11 disciplinary practice.

12 **Q.** And what is a broker-dealer?

13 **A.** A broker-dealer is an entity, could be a person, that  
14 transacts business in securities.

15 **Q.** And where do those transactions occur?

16 **A.** Well, to have -- they have to occur -- to be a  
17 broker-dealer and be subject to broker-dealer regulation, you  
18 have to make use of interstate commerce. So it can't solely  
19 be in the state. Those transactions occur -- you're talking  
20 about the actual securities transactions they do for  
21 customers --

22 **Q.** Right.

23 **A.** -- they occur on exchanges.

24 **Q.** Give me an example of an exchange.

25 **A.** The New York Stock Exchange would be an exchange.

1     **Q.** You mentioned there are FINRA rules that the  
2 broker-dealers have to follow, right?

3     **A.** Correct.

4     **Q.** And what are some examples of rules during your ten years  
5 that the broker-dealers needed to abide by?

6     **A.** Sure. So there are conduct rules, for example. And  
7 conduct rules would be rules like the suitability rule, which  
8 means a broker-dealer can only recommend securities that they  
9 think are in accord with your objectives or rules pertaining  
10 to the amount of markup.

11             MR. FRANK: Objection, Your Honor.

12             THE COURT: What's the objection?

13             MR. FRANK: Inconsistent with the court's prior  
14 ruling. I can explain it at sidebar.

15             THE COURT: All right. I'll hear you at sidebar  
16 briefly.

17             MR. GOLDSTEIN: Your Honor, to save time, why don't  
18 I just move on, unless Mr. Frank wants to push something.

19             THE COURT: If you're moving on, it's moot. Next  
20 question.

21     **Q.** Before FINRA, what did you do for work, sir?

22     **A.** I was general counsel at a Boston-based firm, Tucker  
23 Anthony, that no longer exists.

24     **Q.** And as general counsel at Tucker Anthony, what did that  
25 consist of in terms of your responsibilities and your role?



1     **A.** I had both corporate responsibility, like any corporation  
2     would have, making sure we're okay with our Delaware filings,  
3     following SEC rules or FINRA rules; and the compliance  
4     department, which would try to make sure we were in  
5     compliance with the requirements, as well, reported to me.

6     **Q.** How long were you at Tucker Anthony?

7     **A.** Six years.

8     **Q.** And did your work there relate to broker-dealers?

9     **A.** Tucker Anthony was a broker-dealer and an investment  
10    adviser.

11    **Q.** So what involvement did you have in their broker-dealer  
12    business?

13    **A.** Well, my involvement was, pretty much everything that  
14    they did was run by legal for my purview to make sure that we  
15    were following the requirements of the industry.

16    **Q.** And were you the only lawyer there, or were there other  
17    people that worked under you?

18    **A.** No. We had a small legal department. We had probably  
19    eight lawyers and probably a compliance department of about  
20    ten.

21    **Q.** And did those lawyers in the compliance department, did  
22    they report to you?

23    **A.** Yes.

24    **Q.** And prior to Tucker Anthony, what did you do for work,  
25    sir?

1     **A.** I worked for Prudential Based Securities, later known as  
2     Prudential Securities.

3     **Q.** And what were your responsibilities there?

4     **A.** I first joined them as a general lawyer in the legal  
5     department and then was asked to go to London to become the  
6     compliance officer in London, and eventually I became  
7     international counsel.

8     **Q.** Okay. And in terms of the U.S.-based operations, did you  
9     have any role or responsibility regarding any broker-dealer  
10    work?

11    **A.** Yes. Because the London branch was both a British  
12    broker-dealer and a branch of the U.S. broker-dealer.

13    **Q.** And prior to Prudential, what did you do for work, sir?

14    **A.** I worked at a firm called Tucker Anthony. Thomson  
15    McKinnon. Excuse me.

16    **Q.** What did you do at Thomson McKinnon?

17    **A.** I first joined Thomson as a compliance -- just compliance  
18    analyst. I eventually became the deputy compliance director.  
19    I left there --

20    **Q.** Where were they located?

21    **A.** They were located -- trying to remember -- on Water  
22    Street in New York City.

23    **Q.** And were they a broker-dealer or did you have any  
24    responsibilities with relation to a broker-dealer while you  
25    worked there?

1     **A.** They were a broker-dealer, an investment advisor, and a  
2     futures -- they were a commodity dealer.

3     **Q.** And what responsibilities did you have both as a  
4     compliance analyst and a deputy compliance director, as it  
5     relates to the broker-dealer activities?

6     **A.** I was the one who answered customer complaints. I was  
7     the one that advised, with other people as well, the  
8     operating broker-dealer units of Thomson McKinnon.

9     **Q.** Okay. And how many years have you professionally been  
10    involved in the broker-dealer industry?

11    **A.** It's going on 38 years.

12    **Q.** And are you a member of any professional associations  
13    with regard to that work in the broker-dealer industry?

14    **A.** So when I was in the industry, I was a member of the SIA,  
15    broker-dealer association. I was on the executive committee.

16    **Q.** And how about your schooling, sir?

17    **A.** I went to Davidson College and I went to Syracuse law  
18    school.

19    **Q.** So in your almost 40 years working in the U.S.-based  
20    broker-dealer business, did you become familiar or intersect  
21    at all with the area of transition management?

22    **A.** Well, I certainly -- more so when I became a regulator  
23    because I'm not sure --

24    **Q.** When you say you became a regulator, which --

25    **A.** When I joined FINRA. And when I say "mostly," that

1 iteration of dealing with institutions, because that's just  
2 another way of dealing with institutions or another service  
3 to institutions by broker-dealers or banks and  
4 broker-dealers.

5 That's something you pick up obviously your whole  
6 way through. Because I'm always -- you deal with trading  
7 desks. When you're a compliance officer, the way to help a  
8 trading desk is to go to a trading desk, understand what they  
9 do, understand what clients want.

10 But then as a regulator, you're not just dealing  
11 with the broker-dealer side. You're dealing with the  
12 customer side, and that's where you really begin to  
13 understand even better what we call the buy side, which is  
14 the other side, the institutional side facing broker-dealers.

15 **Q.** And that was during your ten years while you were working  
16 with FINRA, sir?

17 **A.** Well, I had some experience with that, understanding that  
18 from the broker-dealer perspective. Talked to traders, you  
19 understand what they're telling you customers want. But  
20 you're not talking directly to customers.

21 Once you become a regulator, you begin to talk  
22 directly to customers.

23 **Q.** What do you mean by a "regulator"? What exactly do you  
24 mean by that in terms of your work at FINRA?

25 **A.** So FINRA is a regulator. It has regulatory obligations

1 under the law, and it is -- it makes rules. It can't just  
2 make it on its own; it has to have those rules presented to  
3 and approved by the SEC.

4 **Q.** I'm sorry. Go ahead.

5 **A.** And then it goes out and enforces those rules through  
6 examination and investigations.

7 **Q.** And over the course of your 30-plus years in the  
8 industry, did you come to understand how broker-dealers  
9 execute trades?

10 **A.** Oh, yes.

11 **Q.** And can a broker-dealer execute trades as a principal?

12 **A.** Yes.

13 **Q.** And what does that mean for a broker-dealer to be acting  
14 as a principal?

15 **A.** It just means that the broker-dealer in executing that  
16 trade took -- either had those securities in the inventory  
17 and sold it to its customer, or in executing the customer  
18 order, it went out to another party, bought them, momentarily  
19 put them in its inventory, and then sold it to the customer.

20 **Q.** And is that something that is also sometimes referred to  
21 as a proprietary model?

22 **A.** I think we're mixing up terms here. So a proprietary  
23 model and principal really don't intersect. We can talk  
24 about models in a second. But I'm simply referring to how a  
25 trade gets executed. Okay?

1           You can execute a trade as a principal or you can  
2           execute a trade as an agent. Certainly in the equity world  
3           there's no distinction. There are distinctions in the  
4           fixed-income world.

5           **Q.** How does a broker-dealer typically earn compensation when  
6           acting as a principal?

7           **A.** It charges a markup or a markdown. So if you're buying,  
8           it charges a markup. If you're selling, the opposite of a  
9           markup is a markdown. And in the agency world, we would call  
10          it a commission. They're really the same thing.

11          **Q.** And based on your experience in the U.S. broker-dealer  
12          industry and knowledge of the practice and knowledge in the  
13          U.S. broker-dealer industry, are you familiar with the term  
14          riskless principal?

15          **A.** Yes.

16          **Q.** What does that mean?

17          **A.** That simply means that when you went out and bought those  
18          securities from another party, you already had an order in  
19          hand for those securities so you weren't at any risk. At the  
20          time you went out to the other party and bought those  
21          securities, you already knew you had an offsetting order.

22          **Q.** And how does a broker-dealer acting as a riskless  
23          principal typically earn compensation?

24          **A.** The same way as a principal. There's no distinction in  
25          the principal model. You earned it as a markup or a

1 markdown.

2 **Q.** And did institutional -- strike that.

3 What do you understand an institutional investor to  
4 be?

5 **A.** So an institutional investor, we -- actually, there's a  
6 definition in the FINRA rules. But in common parlance, an  
7 institutional investor is an investor of sophistication and  
8 size that is dealing with a broker-dealer.

9 **Q.** And in your experience, would a multi-billion-dollar  
10 pension fund or a sovereign wealth fund or insurance company  
11 be categorized as a institutional or sophisticated or  
12 professional investor?

13 **A.** So we don't have the term "professional investor" in this  
14 country. That's a European term. But yes, they would be  
15 sophisticated and institutional.

16 **Q.** Do institutional investment professionals understand --  
17 in your experience, 30-plus years in the U.S. broker-dealer  
18 industry, do institutional investment professionals  
19 understand that broker-dealers trading as riskless principal  
20 earned remuneration through either markups or markdowns?

21 MR. FRANK: Foundation, Your Honor.

22 THE COURT: Overruled.

23 Let me just explain. So, ladies and gentlemen,  
24 he's testifying generally about his understanding in the  
25 securities industry. That's what this is.

1                   That's what you're offering him for, right?

2                   MR. GOLDSTEIN: Yes, Your Honor.

3                   THE COURT: Go ahead. You can answer.

4           **Q.** Do you recall the question?

5           **A.** Yes.

6           **Q.** So do institutional investment professionals understand  
7           that broker-dealers trading as riskless principal earn  
8           remuneration through either markups or markdowns?

9           **A.** Yes.

10          **Q.** And has that been known in the broker-dealer and  
11          investment institutional investment community?

12          **A.** The institutional investment community expects to deal  
13          only on a principal basis.

14          **Q.** Say that again?

15          **A.** The institutional community expects to deal pretty much,  
16          at least on fixed income, only on a principal basis.

17          **Q.** When you say "principal," are you including within that  
18          riskless principal?

19          **A.** Yes.

20          **Q.** Are they the same to you?

21          **A.** In this case, they would be the same. I mean, there is a  
22          distinction between principal and riskless principal, okay,  
23          and it has ramifications when it comes to issues like markup,  
24          how much in compensation you can earn. But it has no  
25          distinction as to how those trades are done with the



1 institutional side of the business.

2 **Q.** And in both situations, institutional investors would  
3 reasonably expect a broker-dealer to earn remuneration in  
4 both principal and riskless principal through both markups  
5 and markdowns?

6 **A.** Yes.

7 **Q.** And based on your experience in the U.S. broker-dealer  
8 industry and your knowledge of the practice and norms in a  
9 U.S. broker-dealer industry, can a broker-dealer execute  
10 trades in an agency capacity?

11 **A.** Yes.

12 **Q.** What does that mean for a broker-dealer to execute trades  
13 in an agency capacity?

14 **A.** So that means when it went out and bought those  
15 securities, instead of taking it into a proprietary account,  
16 it took it into its general ledger, its books and records,  
17 but not taking ownership of it. It took it into a customer  
18 account and then moved the ownership directly to the  
19 customer.

20 **Q.** And in your experience, do broker-dealers ever trade  
21 fixed-income securities in an agency as opposed to principal  
22 or riskless principal capacity?

23 **A.** They can and they do but not with the institutional side.  
24 They do with the retail side from time to time.

25 **Q.** So let me preface my questions, I'm asking you only about

1 the institutional side, okay?

2 **A.** Okay.

3 **Q.** So can you give an answer with that in mind, sir?

4 **A.** Yeah. I've never seen it done on any basis other than  
5 principal.

6 **Q.** Okay. Based on your experience in the U.S. broker-dealer  
7 industry and your knowledge of practice and norms in the U.S.  
8 broker-dealer industry, are broker-dealers typically  
9 compensated for the services they provide?

10 **A.** Yes.

11 **Q.** Are there costs, fixed or variable costs, associated with  
12 the services provided by broker-dealers?

13 **A.** Yes.

14 **Q.** Can you explain some of those fixed and variable costs?

15 **A.** Sure. You have to pay the people who are executing those  
16 transactions.

17 **Q.** So these are employees?

18 **A.** Those are employees.

19 You have to have systems in place to -- I'm going  
20 to use the word "clear" those transactions, meaning when you  
21 take ownership, right, you have to process those trades in  
22 such a way so they end up in the right account. And in some  
23 cases, you are providing -- not in the institutional world --

24 THE COURT: He's only asking about --

25 **A.** Okay. So there would be no custody services.

1 Q. And are you familiar with the term "best execution"?

2 A. Yes.

3 Q. What does that mean, sir?

4 A. That means in the course of an execution, a broker-dealer  
5 always has best execution obligations to its customer, but --  
6 and it really means one of three things: best price, and/or  
7 speed of execution, and/or certainty of execution.

8 Q. And what do you mean by "speed of execution"?

9 A. So it might be more important to a client to get a trade  
10 executed quickly than to get the absolute best price.

11 Q. And how about "certainty of execution"? What do you mean  
12 by that?

13 A. Again, a client may wish to make sure a trade is executed  
14 rather than making sure that the trade is done at the very  
15 best price.

16 Q. Are there circumstances in which institutional investors  
17 might prioritize speed and/or certainty over getting the  
18 lowest price?

19 A. Yes.

20 Q. And does the duty of best execution preclude or prohibit  
21 broker-dealers from earning remuneration either through a  
22 markup or markdown for the services that the broker-dealer  
23 provides?

24 A. No.

25 Q. Why is that?

1     **A.** Because best execution is -- does not relate at all to  
2 markup rules. What governs remuneration --

3             MR. FRANK: Objection, Your Honor.

4             THE COURT: Sustained as to beyond the scope of the  
5 question.

6     **Q.** What governs remuneration for broker-dealers?

7             MR. FRANK: Objection, Your Honor.

8             THE COURT: What's the objection?

9             MR. FRANK: Same objection as before, to the  
10 extent -- and I'm not sure where we're going with it. But to  
11 the extent that we're getting into the issue that Your Honor  
12 addressed pretrial.

13             THE COURT: Let me just see counsel at sidebar for  
14 a moment. Maybe I can speed this up.

15     **SIDEBAR:**

16             MR. GOLDSTEIN: I don't understand the objection,  
17 Your Honor.

18             MR. FRANK: To the extent we're going to get into  
19 Rule 10(b)10 which governs the permissible amount of  
20 undisclosed markups and riskless principal trades, my  
21 understanding was that the court ruled previously that we  
22 could only get into that to the extent counsel has proved,  
23 provided some basis that the defendant was aware of that  
24 specific rule. There's been no evidence to my knowledge  
25 whatsoever on that point.

1 MR. WEINBERG: I don't agree with Mr. Frank's  
2 recollection of the limits of the evidence. You have here a  
3 FINRA general counsel who is familiar with the rule, the rule  
4 governs broker-dealers trading fixed income in the United  
5 States, and it says in contrast to equities where disclosure  
6 is required, that disclosure is not required for fixed income  
7 for professional and institutional investors. It's a crucial  
8 part of his explanation as to why institutional investors  
9 expect broker-dealers to charge --

10 THE COURT: So essentially what you want, what you  
11 anticipate he's going to say is that the FINRA rules don't  
12 require disclosure of the amount of compensation for  
13 broker-dealers.

14 MR. GOLDSTEIN: Eventually, yes.

15 MR. FRANK: So we specifically addressed this issue  
16 pretrial. And unless my memory is completely mistaken, which  
17 I don't think it is, the issue was that the defense had to  
18 present some proof that the defendant was aware of this rule.  
19 They're now -- if they're now arguing that it's relevant to  
20 what institutional investors expect, that's a different  
21 argument that was made pretrial and it seems to me a  
22 back-door way of getting at exactly the thing the court  
23 previously ruled on.

24 MR. WEINBERG: The defendant is on a committee for  
25 State Street Global Markets, which was the broker/dealer.

1 This is the guidepost. This is what broker-dealers are  
2 allowed by FINRA to do or not do. They're not required to  
3 make disclosure on buys. They are on equity. It's known by  
4 everybody in the financial markets.

5 MR. FRANK: There's been no evidence of what he  
6 knows in his capacity working --

7 THE COURT: No specific evidence that he knows, but  
8 given the general evidence that I've heard, I'm prepared to  
9 allow some of this. Overruled for now.

10 (End of sidebar.)

11 BY MR. GOLDSTEIN:

12 Q. So, Mr. Menchel, are there any specific SEC rules  
13 governing disclosure of broker-dealer compensation?

14 A. No.

15 THE COURT: SEC or FINRA?

16 Q. FINRA or SEC, sir, are there any rules governing  
17 disclosure of broker-dealer compensation?

18 A. I'm sorry. Disclosure, yes.

19 Q. And which rule is that?

20 A. 10(b)10.

21 Q. And what, if anything, does Rule 10(b)10 require  
22 broker-dealers trading fixed-income securities as a riskless  
23 principal or principal, what does it require of them in terms  
24 of disclosing broker-dealer compensation?

25 A. It says that broker-dealers can disclose the transaction

1 as a matter of price, the full price, or the yield.

2 **Q.** Do they have a duty to disclose the costs or amount of  
3 any remuneration earned through a markup or a markdown?

4 **A.** No.

5 **Q.** Based on your experience in the U.S. broker-dealer  
6 industry and your knowledge of the practice and norms in the  
7 U.S. broker-dealer industry, is it customary for a  
8 broker-dealer to take a markup or markdown when acting as a  
9 principal or riskless principal?

10 **A.** It is customary.

11 **Q.** And is there a limit to the amount of a markup or  
12 markdown a broker can take in these circumstances?

13 **A.** Yes.

14 **Q.** What is that limit?

15 **A.** Well, there is no fixed limit per se.

16 **Q.** Is there something called a 5 percent rule?

17 **A.** There is.

18 **Q.** And what is that?

19 **A.** That's a FINRA rule. It's not really called a 5 percent  
20 rule. It's called the markup rule. And there is a specific  
21 section dealing with fixed income, and it really begins with  
22 the idea that FINRA has a 5 percent guideline. But then it  
23 goes into various factors that should inform that guideline.

24 **Q.** And contrasted with 5 percent, what is a percent -- what  
25 is a basis point in terms of a percentage?

1     **A.** Well, a basis point is 1/100 of a percentage.

2     **Q.** So what you're testifying to is that a broker-dealer, the  
3 upper limits of a markup or markdown is 5 percent compared to  
4 a basis point, which is 1/100 of 1 percent?

5     **A.** So there's no limit. It's a guideline. The rule says  
6 there's no limit, and the SEC has repeated that there's no  
7 limit.

8             But there has to be a benchmark. When I was at  
9 FINRA, in fact most equity markups coalesce around 2.8  
10 percent. Fixed income tends to be lower, and enforcement  
11 cases tended to happen only after 4 percent.

12             And because of that, we -- the SEC thought that was  
13 too high a markup even under the 5 percent guideline to begin  
14 the enforcement activities. And because of that, we  
15 promulgated, an addition to the markup rule that related  
16 specifically to debt.

17     **Q.** Okay. And is it common in your experience for a  
18 broker-dealer to take a markup of a quarter of a point or  
19 25 basis points?

20     **A.** Yes.

21     **Q.** And is it -- in your experience, is a markup of 2 basis  
22 points of yield excessive?

23             MR. FRANK: Your Honor, could we have a particular  
24 security that he's talking about?

25             THE COURT: Yes.



1       **Q.** Fixed income.

2               MR. FRANK: No, Your Honor. I mean, could we have  
3 a -- markups -- is he talking about any fixed-income  
4 security, or is he talking about a particular fixed-income  
5 security?

6               MR. GOLDSTEIN: As a matter of practice, Your  
7 Honor.

8               THE COURT: As to just all types of bonds or  
9 categories of bonds like corporate bonds --

10       **Q.** Let's start with corporate bonds.

11       **A.** So with corporate bonds, you can take a higher yield than  
12 you would on a treasury bond. And on a low-rated bond you  
13 could take a higher markup than you would on a corporate  
14 bond.

15               THE COURT: You were asking what's customary in the  
16 industry?

17               MR. GOLDSTEIN: Yes.

18               THE COURT: Why don't you phrase the questions that  
19 way.

20       **Q.** Basically, let me move on to a different subject matter,  
21 Mr. Menchel.

22               Based on your experience in the U.S. broker-dealer  
23 industry and your knowledge of the practice and norms, what  
24 is the reason for a distinction between institutional and  
25 non-institutional customers?

1 MR. FRANK: Objection, relevance.

2 THE COURT: Overruled.

3 **A.** It goes to the duties that are owed. And so there are  
4 oftentimes less duties under the entire scheme owed to  
5 institutional clients than are owed to retail clients.

6 **Q.** And do broker-dealers acting as riskless principal and  
7 trading fixed-income securities disclose markups, in your  
8 practice and experience?

9 **A.** I'm sorry. Say that again.

10 **Q.** Do broker-dealers acting as riskless principal in trading  
11 fixed-income securities disclose the markups that they have  
12 charged?

13 **A.** No.

14 **Q.** Why not?

15 **A.** Because 10(b)10 does not require it. And since  
16 broker-dealers gear their confirmation process to the federal  
17 requirements, they would not disclose it.

18 **Q.** Did you have any understanding as to whether industry  
19 participants would support a rule requiring disclosure of  
20 markups on --

21 MR. FRANK: Objection.

22 THE COURT: Sustained.

23 **Q.** Based on your experience, Mr. Menchel, what does an  
24 agency approach to trading mean?

25 **A.** Well, it depends upon the context. In the context in

1 which the materials I read, it means that you're not trading  
2 against your customer.

3 **Q.** What do you mean by that, when you say "trading against  
4 your customer"?

5 **A.** So when you're an institution and you bring certain  
6 trades to your customer, to a broker-dealer, that can tell  
7 the broker-dealer or allow them to make educated guesses  
8 about what your strategies may be in the market. And they  
9 can take advantage of that information and trade against it.

10 When a broker-dealer tells the institutions we have  
11 an agency platform, that really means all I care about is  
12 getting your order done. I'm not going to try to trade  
13 against your strategy.

14 **Q.** What are some examples of how they might trade against  
15 the client strategy in that circumstance?

16 **A.** So for example, you have a very large mutual fund that  
17 comes in and says to a broker-dealer, I need to sell a very  
18 large position -- I'll just make this up -- in Microsoft.

19 A broker-dealer that had a proprietary trading arm  
20 could possibly take advantage of that. The legality of that  
21 is questionable, but they could take advantage of that,  
22 right, and use that information to their benefit and make  
23 money in the market.

24 When you say to an institution, I have an agency  
25 platform, what you're saying is that's not what I do. I'm

1 here to execute your trades. I'm not interested in your  
2 strategy. I'm not taking advantage of that.

3 **Q.** And is an agency approach to trading, is that a promise  
4 to execute trades free of charge for a broker-dealer?

5 **A.** No.

6 **Q.** Does an agency approach to trading preclude a  
7 broker-dealer from earning remuneration either through  
8 markups or markdowns?

9 **A.** No.

10 **Q.** Why do broker-dealers acting as principal or riskless  
11 principal charge markups or markdowns?

12 **A.** That's the business they're in. I mean, the service that  
13 they're offering is execution, and they have to pay for the  
14 costs of getting that done.

15 **Q.** And are the execution services provided by a  
16 broker-dealer distinct from transition management services?

17 MR. FRANK: Objection.

18 THE COURT: Overruled.

19 **A.** Yes. Transition management services, you're paying a fee  
20 for a transition manager, and then there has to be an  
21 execution of the trades.

22 **Q.** What does a transition manager do, meaning that is  
23 distinct from broker-dealer? What's their role?

24 MR. FRANK: Objection, foundation.

25 THE COURT: Sustained just as to foundation.

1     **Q.** What's the broker-dealer's role in terms of a transition  
2 management strategy?

3             MR. FRANK: Objection, foundation.

4             THE COURT: If you know, you can answer. It's  
5 overruled.

6     **A.** Okay. So if the broker-dealer is the transition manager,  
7 which it could be the case, it is doing two things.

8             It is saying, I'm going to help you meet your goals  
9 in the transition, okay, which is there's a cost to make the  
10 transition, right? When you move from one set of assets to  
11 another, there are costs involved in that. Not just trading  
12 costs, right?

13             There are costs such as the implementation. I'm  
14 selling one portfolio, I'm moving to another. I may be  
15 moving from one currency to another. There are opportunity  
16 costs. There are risks. There's timing, okay?

17             And what the transition manager does is say, Here  
18 is what I think we can do, here is what the total costs to  
19 you are in doing that. Meaning, what's going -- what is it  
20 going to cost you to move from one --

21             MR. FRANK: I object to any testimony about what  
22 transition managers do. There's no foundation for that.

23             THE COURT: Sustained as to that.

24     **Q.** In your experience, sir, are --

25             MR. FRANK: And I move to strike it, actually.

1 THE COURT: Yes.

2 BY MR. FRANK:

3 Q. Are the two distinct services offered, one by a  
4 transition manager and one by the broker-dealer, are they  
5 typically compensated separately?

6 MR. FRANK: Your Honor, I object on foundation  
7 grounds. This witness is not an expert on transition  
8 managers.

9 THE COURT: Let's just --

10 MR. FRANK: Sorry.

11 Q. Mr. Menchel, you have 30-plus years in the securities  
12 industry in the United States, correct?

13 A. Correct.

14 Q. You worked for FINRA for ten years as general counsel,  
15 correct?

16 A. Correct.

17 Q. Another 20-plus years as general counsel or as a lawyer  
18 working with, inside and for broker-dealers, correct?

19 A. Correct.

20 Q. During that period of time, I believe you testified that  
21 you have experienced working with or dealing with transition  
22 management services, correct?

23 MR. FRANK: Your Honor, I object as beyond the  
24 scope of the disclosed testimony, of the disclosed  
25 qualifications.

1 THE COURT: I think that might be beyond the scope  
2 of the report, Mr. Goldstein.

3 MR. GOLDSTEIN: I can move on, Your Honor.

4 THE COURT: Okay.

5 **Q.** Mr. Menchel, based on your experience in the U.S.  
6 broker-dealer industry and your knowledge of the practice and  
7 norms in the U.S. broker-dealer industry, are you aware of  
8 any prohibition on a banking entity charging a transition  
9 management fee and an affiliated broker-dealer earning  
10 remuneration through either a markup or a markdown?

11 MR. FRANK: Objection as to transition management,  
12 Your Honor.

13 THE COURT: Overruled as to that question.

14 **A.** I'm not aware of such a ban.

15 **Q.** I'm sorry. I didn't hear you.

16 **A.** I'm not aware of any ban.

17 **Q.** And does that apply to both equity and fixed-income  
18 executions?

19 **A.** Yes.

20 **Q.** And would institutional professionals reasonably expect a  
21 flat management fee paid to a transition manager to be the  
22 sole compensation for the manager and affiliated  
23 broker-dealers?

24 MR. FRANK: Objection.

25 THE COURT: Sustained.

1       **Q.** Are there any reasons why a transition management client  
2 might prefer to use an affiliated broker-dealer?

3               MR. FRANK: Objection.

4               MR. GOLDSTEIN: Your Honor, I point you to  
5 Paragraph 3A on page 5 of the disclosure.

6               THE COURT: Thank you.

7               MR. FRANK: It's an issue of foundation, Your  
8 Honor.

9               THE COURT: Overruled as to the foundation.  
10 You can answer.

11       **A.** Yes, there is a reason.

12       **Q.** Why is that, sir?

13       **A.** Well, because in doing the executions, if you use an  
14 affiliate, you have more control as to how those executions  
15 take place.

16       **Q.** Are you familiar with the term "implementation  
17 shortfall"?

18       **A.** Yes.

19       **Q.** And can you please describe it?

20               MR. FRANK: Objection.

21               THE COURT: Isn't that beyond the scope of the  
22 report, Mr. Goldstein?

23               MR. GOLDSTEIN: I'll move on, Your Honor.

24               May I have one moment, Your Honor?

25               THE COURT: You may.



1 MR. GOLDSTEIN: Thank you.

2 Your Honor, in terms of the implementation  
3 shortfall, if I can refer you to Paragraph 4 on page 5.

4 THE COURT: Okay.

5 MR. FRANK: My objection is on foundation, Your  
6 Honor.

7 THE COURT: Ask the question again and then I'll  
8 hear the objection. Or ask the question you want to ask and  
9 then I'll see.

10 MR. GOLDSTEIN: Just one moment, Your Honor.

11 BY MR. GOLDSTEIN:

12 **Q.** Are you familiar with the term "implementation  
13 shortfall"?

14 **A.** I am.

15 **Q.** And please describe it.

16 MR. FRANK: Objection, Your Honor.

17 THE COURT: Foundation?

18 MR. FRANK: Yes, Your Honor.

19 THE COURT: Overruled as to that.

20 You can answer the question.

21 **A.** Sure. You have a benchmark of expectations of what  
22 you're going to achieve in a transition, what your costs are  
23 going to be -- outside trading costs, maybe even including  
24 trading costs, right -- and you have a target that you're  
25 going for.

1           The implementation shortfall would be did I achieve  
2     that target or did I not achieve that target? If I don't  
3     achieve that target, I have an implementation shortfall. If  
4     I do better than that -- if I hit that target, I've hit my  
5     target. Or I could maybe even do better than my target. But  
6     it's really jargon.

7     **Q.** And in your experience, what importance, if any, do  
8     institutional market professionals attach to the  
9     implementation shortfall?

10           MR. FRANK: Objection, Your Honor.

11           THE COURT: Customarily, what was customary at that  
12     time?

13           MR. GOLDSTEIN: Yes.

14           MR. FRANK: Your Honor, it's a transition  
15     management term, as it's been discussed. And unless there's  
16     a representation that it's outside the context of transition  
17     management, we object on foundation grounds.

18           THE COURT: Overruled.

19     **A.** I'm sorry. I got lost in the colloquy.

20     **Q.** What importance, if any, do institutional market  
21     professionals attach to the implementation shortfall?

22           THE COURT: What's the customary practice?

23     **Q.** Customary practice.

24     **A.** Well, it's what you're shooting for. It's a hope, right?

25           So if I could explain it by example, sometimes it

1 is what you hope to achieve in moving from one set of assets  
2 to another. A set of outcomes. Foreign exchange costs.  
3 Opportunity costs. Okay? Market professionals understand  
4 it's an estimate, okay, and then they will judge you by how  
5 good you do versus that estimate.

6 **Q.** In your experience and customary practice, is the overall  
7 implementation shortfall more or less important to  
8 institutional market professionals than a broker-dealer's  
9 remuneration for the broker-dealer services?

10 MR. FRANK: Objection, foundation.

11 THE COURT: Overruled.

12 **A.** What's important is the implementation shortfall.  
13 Because they don't care. An institution -- and this is true  
14 of any execution. No -- no institution really cares what a  
15 broker-dealer makes as long as the price they get or the  
16 expectation they get for the order is met.

17 **Q.** And when securities are traded, is it necessary for a  
18 broker-dealer to participate in the execution of those  
19 transactions?

20 **A.** It's essential.

21 **Q.** And when assets are transitioned, whether it's an  
22 affiliated broker-dealer or an external broker-dealer, will  
23 there be costs imposed or remuneration imposed for those  
24 broker-dealer services?

25 **A.** Yes.

1 MR. GOLDSTEIN: May I have one moment, Your Honor?

2 THE COURT: You may.

3 Q. Mr. Menchel, in connection with your extensive experience  
4 in the broker-dealer industry --

5 MR. FRANK: Objection to the commentary, Your  
6 Honor.

7 THE COURT: Overruled.

8 Q. -- did you become aware of an investigation into the  
9 business practices of a company named ConvergeEx?

10 MR. FRANK: Objection as beyond the scope, Your  
11 Honor.

12 THE COURT: Sustained.

13 MR. GOLDSTEIN: Nothing further, Your Honor.

14 **CROSS-EXAMINATION BY COUNSEL FOR PLAINTIFF**

15 BY MR. FRANK:

16 Q. Good afternoon, Mr. Menchel. How are you?

17 A. Good. How are you?

18 Q. Thank you. I'm well.

19 You worked at FINRA before you were a consultant?

20 A. Yes.

21 Q. And you haven't worked as a transition manager, have you?

22 A. No.

23 Q. And you've never supervised a transition manager?

24 A. No.

25 Q. And you've never negotiated a transition management

1 agreement?

2 **A.** No.

3 **Q.** And you've never worked as a pension fund manager?

4 **A.** No.

5 **Q.** And you've never traded bonds on a trading desk?

6 **A.** Not on a trading desk, no.

7 **Q.** And you've never been a direct supervisor of anyone who  
8 traded bonds on a trading desk?

9 **A.** Not a direct supervisor.

10 **Q.** And you've never calculated an implementation shortfall  
11 in a transition, have you, sir?

12 **A.** No.

13 **Q.** You testified, Mr. Menchel, that broker-dealers acting as  
14 riskless principals charge markups on bonds. Was that your  
15 testimony?

16 **A.** Correct.

17 **Q.** And a markup is an amount that's added to the principal  
18 price; is that correct? Or a markdown is deducted from the  
19 price, correct?

20 **A.** Correct.

21 **Q.** And your testimony is that the term "commission" does not  
22 apply in a principal or riskless principal setting, correct?

23 **A.** It's just not the term used.

24 **Q.** It never applies, correct?

25 **A.** No, that's not correct. It's not the term used. Because

1 they really are the same thing.

2 **Q.** They're the same thing; is that right?

3 **A.** Yes, yes.

4 **Q.** And isn't it true, sir, that your testimony is that that  
5 term never applies?

6 **A.** No. I'm not sure what you're referring to.

7 **Q.** Does the term "commission" ever apply in a principal  
8 setting?

9 **A.** The term "commission" and the word "markup" are the same  
10 thing.

11 **Q.** Does the term "commission" ever apply in a principal  
12 setting?

13 **A.** Well, from a regulatory point of view --

14 **Q.** Can you answer my question yes or no, sir?

15 **A.** I can't answer it yes or no because it's not susceptible  
16 to a yes-or-no answer.

17 **Q.** Do you recall testifying in the matter of United States  
18 v. Jesse Litvak?

19 **A.** Yes.

20 **Q.** Did you testify on March 4 of 2014?

21 **A.** Yes.

22 **Q.** In the District of Connecticut?

23 **A.** Yes.

24 **Q.** You were under oath?

25 **A.** Yes.

1 Q. Do you recall testifying:

2 Question: "Does the term 'commission' ever apply  
3 in a principal setting?"

4 MR. GOLDSTEIN: Your Honor, this is not  
5 inconsistent with anything that Mr. Menchel just said to him.

6 THE COURT: Overruled.

7 Q. Question: "Does the term 'commission' ever apply in a  
8 principal setting?"

9 Answer: "Never."

10 Was that your testimony under oath in the matter of  
11 United States v. Litvak?

12 A. Yes.

13 Q. Was it true at the time you said it?

14 A. Yes.

15 Q. Is it true today?

16 A. Okay, yes.

17 Q. Okay, yes?

18 A. Okay, yes. Context means everything.

19 Q. Is the statement true, sir?

20 A. The statement is true because the --

21 Q. Thank you.

22 A. -- term "commission" --

23 Q. Thank you.

24 A. -- is principal.

25 Q. Thank you.

1           And they're the same thing, commission and markups,  
2           just different words for the same economic principle,  
3           correct?

4           **A.**   Correct.

5           MR. FRANK:   Could we look at Exhibit 59, please.

6           **Q.**   Have you seen this document, Mr. Menchel?

7           **A.**   I may have.   I just don't recall.

8           **Q.**   Well, how many documents have you reviewed in preparation  
9           for your testimony today?

10          **A.**   Mostly -- probably 20, 25.

11          **Q.**   20 or 25 documents is the entire universe of documents  
12          you reviewed in preparation for testifying in this trial  
13          today?

14          **A.**   Yeah, because I wasn't a fact witness.   I was only asked  
15          about market practice.

16          **Q.**   It's a yes-or-no question, sir.   20 or 25 documents is  
17          the extent of the documents you reviewed in preparing for  
18          this case?

19          **A.**   That's what I think is correct.

20          **Q.**   And who selected those documents?   Did you select those  
21          documents, or did counsel select those documents for you?

22          **A.**   Counsel.

23          **Q.**   And was this one of those documents?

24          **A.**   I just don't recall.

25          **Q.**   These are trading instructions.   Is that what they appear



1 to you to be?

2 I'll represent to you that these are trading  
3 instructions.

4 **A.** Okay.

5 **Q.** And do you see that there's a reference to commissions,  
6 2 basis points of value on the sell side and 18 basis points  
7 of value on the buy side? Do you see that?

8 **A.** Yes, yes.

9 **Q.** And these are trading instructions for bonds. Do you see  
10 that?

11 **A.** Yes.

12 **Q.** So would you agree that in these trading instructions at  
13 State Street Bank they use the word "commissions" with  
14 reference to bonds?

15 **MR. GOLDSTEIN:** Your Honor, I object. The witness  
16 has no context for the questions that are being asked of him  
17 as to these specific documents.

18 **THE COURT:** Sustained.

19 **Q.** Does it appear that the word "commissions" is on this  
20 document, sir?

21 **A.** Yes.

22 **Q.** And it appears to refer to bonds?

23 **A.** Yes.

24 **MR. GOLDSTEIN:** I object.

25 **THE COURT:** Sustained.

1 MR. FRANK: Your Honor, I'm not sure I understand.

2 THE COURT: I just think -- he hasn't read this  
3 document, so I don't know what -- how he can give an  
4 interpretation of it. He can say what's on it.

5 MR. FRANK: He has testified that bonds are always  
6 traded --

7 Q. Have you testified that bonds are always traded as  
8 principal or riskless principal? Correct?

9 A. Well, unless they're done on an equity basis, on an  
10 agency basis.

11 Q. Wasn't it your testimony that you've never seen that,  
12 sir? You've only ever seen bonds traded on a principal or  
13 riskless principal basis?

14 A. In the institutional setting.

15 Q. Well, would you agree that -- this case is about  
16 institutional investors, correct?

17 A. Right.

18 Q. And so we're looking at a set of trading instructions  
19 relevant to this case, correct?

20 MR. GOLDSTEIN: He doesn't know, Your Honor, what  
21 he's looking at.

22 MR. FRANK: I'm representing it to him.

23 Q. If these are trading instructions relevant to this case,  
24 would you agree that they are for institutional investors?

25 MR. GOLDSTEIN: Your Honor, there's an order here.

1 I object.

2 MR. FRANK: Your Honor, I'm allowed to impeach with  
3 documents that are in evidence.

4 THE COURT: I think the issue is asking him his  
5 specific understanding of a document he's never seen or read  
6 as opposed to -- there's nothing wrong with the line of  
7 questioning you're asking.

8 MR. FRANK: I understand. I understand.

9 Q. Your testimony was that with respect to institutional  
10 investors, bonds are always traded on a principal or riskless  
11 principal basis. Yes or no?

12 A. Yes.

13 Q. And your testimony was that the term "commission" is  
14 improper when referring to trades on a principal or riskless  
15 principal basis. Yes or no?

16 A. I didn't say "improper."

17 Q. You said it was never used. Yes or no?

18 A. Yes.

19 Q. These trading instructions refer to bonds traded for an  
20 institutional investor, correct?

21 MR. GOLDSTEIN: Objection.

22 THE COURT: Sustained. He doesn't know.

23 Q. These trading instructions refer to bonds on their face.

24 THE COURT: Sustained.

25 MR. GOLDSTEIN: Thank you.

1 MR. FRANK: Let's look at Exhibit 206.

2 Q. Have you seen this document before?

3 A. I just don't recall.

4 Q. Out of 20 or 25 documents that you've reviewed, you don't  
5 recall any of these documents?

6 A. These weren't -- these weren't material to me.

7 Q. How do you know if they were material to you if you don't  
8 know if you've seen them?

9 A. Because it wasn't what I was really retained to do as an  
10 expert.

11 Q. You're testifying about the term "commission," "markup,"  
12 "markdown" in a principal or riskless principal or agency  
13 setting, are you not?

14 A. I am.

15 Q. These documents are documents in this case, correct?

16 A. Yes.

17 Q. Did you select the documents you looked at or did counsel  
18 decide what would be material to your testimony?

19 MR. GOLDSTEIN: Asked and answered.

20 THE COURT: Sustained.

21 Q. Did counsel decide what was material to your testimony?

22 MR. GOLDSTEIN: Again, objection, Your Honor.

23 THE COURT: That's overruled as to that.

24 You can answer that.

25 THE WITNESS: I can answer? Okay.

1 THE COURT: You can answer. Sorry.

2 A. Not entirely, because counsel asked me certain questions  
3 about practices in the industry.

4 Q. Did counsel select the documents that you looked at?

5 MR. GOLDSTEIN: Asked and answered.

6 A. Yes.

7 THE COURT: Overruled.

8 Q. Counsel decided which documents were material for you to  
9 look at with respect to your testimony, yes?

10 A. Yes. But those are not the only documents I looked at.

11 Q. And you don't -- I thought you just said 20 or 25  
12 documents.

13 A. I did. But that's not the only documents that I looked  
14 at. I also looked at 10(b)10.

15 Q. I'm not asking you about 10(b)10. We'll get to that,  
16 sir.

17 This document that you're looking at right now,  
18 have you looked at it before?

19 A. I just don't recall.

20 Q. Does it appear to you to be another set of trading  
21 instructions?

22 A. Yes.

23 Q. Does it appear to use the word "commission"?

24 A. It used that word.

25 MR. FRANK: Could we look at Exhibit 122, please.

1 Q. Is this one of the documents --

2 MR. FRANK: Can you blow it up, please?

3 Q. Have you looked at this document?

4 A. I don't recall.

5 Q. Another document you don't recall.

6 A. I really don't recall any documents other than the  
7 documents that have to do with the proposals.

8 Q. So the only documents you can recall looking at are  
9 documents relating to the proposals made to State Street  
10 clients?

11 A. Yes.

12 Q. So you don't recall this document?

13 A. Not particularly.

14 Q. And this document says "Regarding AXA trading" at the  
15 top, correct?

16 A. Yes.

17 Q. And it says "Execution and commentary for today's  
18 trading," correct?

19 A. Yes.

20 MR. FRANK: Could we look at the attachment,  
21 please.

22 Could we look at the top part of that page?

23 Q. Would you agree with me, sir, that these appear to be  
24 bond trades?

25 A. Yes.

1 Q. Would you agree with me, sir, that on the far right  
2 there's a commission column?

3 A. Yes.

4 Q. Would you agree with me that it appears that at least at  
5 State Street the term "commission" is used with respect to  
6 charges on bonds?

7 MR. GOLDSTEIN: I object, Your Honor.

8 THE COURT: I think you can ask him whether in  
9 these documents it was used.

10 MR. FRANK: Fair enough. Thank you, Your Honor.

11 Q. Would you agree with me that in these State Street  
12 documents the term "commission" is used with respect to  
13 charges on bonds?

14 MR. GOLDSTEIN: I object, Your Honor. He's got no  
15 context for this document.

16 MR. FRANK: That's not my fault, Your Honor.

17 THE COURT: All right.

18 So, ladies and gentlemen of the jury, you should  
19 disregard that comment as to the characterization. The  
20 lawyers make decisions. It's not a question of fault here  
21 about what the witness does or doesn't know. He's not a fact  
22 witness. He's not offered as a fact witness. And so  
23 that's -- what he knows is for you to draw inferences about,  
24 and I'll instruct you about witnesses like this in terms of  
25 you'll evaluate the weight and the like of their testimony,

1 just like you will other witnesses.

2 And so you can ask him what the documents say, to  
3 the extent he knows.

4 **Q.** Does it appear to you that on this State Street document  
5 the word "commission" was used to refer to charges that were  
6 applied to bond trades?

7 **MR. GOLDSTEIN:** I object to the latter part of the  
8 question. He can testify to what's shown in the document but  
9 not in terms of the context of the document.

10 **MR. FRANK:** I'm not asking about the context, Your  
11 Honor. There was a document labeled "Execution and Trading."  
12 I'm showing him the attachment.

13 **THE COURT:** I think if you break it apart, you can  
14 get what you want.

15 **Q.** Do these appear to be bond executions?

16 **A.** I think so.

17 **Q.** And does it appear that the word "commission" is used to  
18 apply to charges applied to these bond executions?

19 **A.** Well, when you say "the charges," I don't see -- I see  
20 zeros and I see the word "commission."

21 **Q.** Let's look lower down the page, that same column. Page  
22 2, actually.

23 Now do you see charges in that column?

24 **A.** Yes.

25 **Q.** Does it appear to you now that there are commission



1 charges applied to these bond trades?

2 **A.** It would appear so.

3 **Q.** And if you look at the bonds to which the commission  
4 charges have been applied, they appear to be U.S. Treasury  
5 bonds; is that correct?

6 Could you just focus on --

7 **A.** Some are.

8 **Q.** And some are mortgage-backed securities, correct?

9 **A.** Right.

10 **Q.** Also a form of bonds?

11 **A.** Correct.

12 **Q.** And the commission charges have not been applied to  
13 corporate bonds; is that correct?

14 THE COURT: On this selection.

15 In other words, the question is, is there a zero in  
16 that column in what's blown up with respect to things that  
17 appear to be corporate bonds?

18 **A.** Yeah, I mean, obviously. For example, United --

19 **Q.** It's a yes-or-no question.

20 THE COURT: Just answer yes or no as to that.

21 THE WITNESS: On the ones that are blown up?

22 THE COURT: Yes.

23 **Q.** Those are U.S. treasuries.

24 **A.** Yes.

25 **Q.** I'm asking you the ones that are highlighted. Above it,

1 do you see it says "United Parcel Service"?

2 **A.** Yes.

3 **Q.** That's a company, correct?

4 **A.** Correct.

5 **Q.** It appears no commission was charged on those corporate  
6 bonds, correct?

7 **A.** I don't know if they're corporate bonds.

8 **Q.** You don't know if bonds issued by the United Parcel  
9 Service are corporate bonds?

10 **A.** I don't know if it's the bond or the equity.

11 **Q.** Didn't you just testify these appear to be bond trades?

12 **A.** It did -- I don't know if everything on here is a bond or  
13 this is a mix of bonds and equities. I don't know that.

14 **Q.** You don't know about the AXA transition?

15 **A.** I don't know what this document is showing.

16 **Q.** Did you review documents in connection with the AXA  
17 transition?

18 **A.** Not the transition itself.

19 **Q.** Are you aware that State Street transitioned billions of  
20 dollars worth of bonds for AXA and there were no equities  
21 involved?

22 **A.** I didn't know whether there were no equities involved or  
23 not.

24 **Q.** You were aware that they transacted billions of dollars  
25 worth of bonds for AXA?

1     **A.** I know there were a lot of bonds.

2     **Q.** And you reviewed documents in connection with AXA in  
3     preparation for your testimony today?

4     **A.** I recall reviewing -- actually, I recall reviewing -- I  
5     don't know -- it might have been AXA, the proposal.

6     **Q.** So you can't testify from looking at these documents  
7     whether these are bonds or stocks. Is that your testimony?

8     **A.** I don't know.

9     **Q.** Well, can you look at the CUSIP number? Wouldn't that  
10    tell you?

11           MR. FRANK: Can we move further left?

12    **A.** Yeah, the CUSIP number would tell you.

13           MR. FRANK: Let's move further left.

14    **Q.** Now can you tell whether they're bonds?

15    **A.** They appear to be bond CUSIPs.

16    **Q.** And would you agree that on the corporate bonds there is  
17    no commission that's been applied in the commission column?

18    **A.** Yes.

19           MR. FRANK: Can we look at Exhibit 127, please.

20    Can you blow it up a little more than that, please.

21    **Q.** Okay. More trading instructions. Have you reviewed  
22    these, Mr. Menchel?

23    **A.** I don't recall.

24    **Q.** You don't know?

25    **A.** I don't recall.

1 Q. Do you recall reviewing any trading instructions?

2 A. Oh, yeah.

3 Q. But you don't recall the three that we've now looked at?

4 A. No.

5 Q. And these appear to be trading instructions for bonds,  
6 correct? Do you see first --

7 A. Yes.

8 Q. -- fixed-income sales, fixed-income buys?

9 A. Yes.

10 Q. And again we see the word "commissions," correct?

11 A. Yes.

12 MR. FRANK: Could we look at Exhibit 168, please.

13 Q. Have you looked at this document before?

14 A. Hold on a second.

15 (Witness reviews document.)

16 I think I have seen this one before.

17 Q. And so when you testified earlier that the term  
18 "commission" is never used for principal or riskless  
19 principal trades in fixed-income securities, that was after  
20 you had looked at this document?

21 A. Yes.

22 Q. And can we agree, sir, that on this document the term  
23 "commissions" is used specifically with respect to  
24 fixed-income trading?

25 A. It's used in slang in this, yes.

1 Q. I'm sorry, sir?

2 A. It's used in slang or industry jargon here, yes, but not  
3 in confirmations ever.

4 Q. I wasn't asking about confirmations, was I?

5 A. That's what my testimony was about.

6 Q. I don't recall you using the word "confirmation" in your  
7 testimony. Did I miss it?

8 A. I don't know.

9 Q. Can we agree that in this email, which as you'll note was  
10 blind-copied to the defendant, Ross McLellan, the term  
11 "commissions" was used in connection with fixed-income  
12 trading?

13 A. Yes.

14 Q. And this email was sent to a client, Ian McKnight?

15 MR. GOLDSTEIN: Objection, Your Honor.

16 THE COURT: Sustained.

17 Q. You don't know who Ian McKnight is?

18 A. I don't know.

19 Q. Do you know who came up with the term "inadvertent  
20 commissions" with respect to these fixed-income trades?

21 MR. GOLDSTEIN: Objection, Your Honor.

22 THE COURT: Sustained.

23 A. I don't know.

24 THE COURT: You don't have to answer the question.

25 It's sustained.

1     **Q.** Have you spoken with the defendant in preparation for  
2     your testimony today?

3     **A.** No.

4     **Q.** You've never spoken with the defendant?

5     **A.** No.

6     **Q.** You've never interviewed the defendant as part of  
7     preparing your testimony?

8             MR. GOLDSTEIN: Asked and answered twice.

9             THE COURT: Sustained.

10    **Q.** So you have no basis for knowing what he knows, do you,  
11    sir?

12            MR. WEINBERG: May we reserve an objection at the  
13    sidebar later, Your Honor?

14            THE COURT: Yes.

15            Sustained as to that question, in any event. Next  
16    question.

17    **Q.** You testified about Rule 10(b)10?

18    **A.** Yes.

19    **Q.** Did you ever speak with the defendant about Rule 10(b)10?

20            MR. GOLDSTEIN: Asked and answered, Your Honor.

21            MR. WEINBERG: May we approach the bench, Your  
22    Honor?

23            THE COURT: Sustained as to this question. Why do  
24    we need to approach the bench?

25            MR. WEINBERG: May I reserve a different objection

1 then at the break?

2 THE COURT: Yes.

3 MR. WEINBERG: I didn't realize the time. Sorry.

4 MR. FRANK: Your Honor, I'm about to start a new  
5 topic.

6 THE COURT: All right. Ladies and gentlemen, so  
7 we'll break for the day. Keep an open mind. You haven't  
8 heard all the evidence or the closing arguments or  
9 instructions. Don't discuss the case among yourselves, don't  
10 discuss it with anyone else, don't do any independent  
11 research. I'll see you tomorrow morning. Thank you for your  
12 attention. We will resume at 9:00 a.m. tomorrow.

13 All rise for the jury.

14 (Jury exits the courtroom.)

15 THE COURT: Mr. Menchel, you're excused, and you  
16 should step out.

17 You can be seated. Sorry.

18 You said you wanted to address something.

19 MR. WEINBERG: Yes. I think Mr. Frank's questions  
20 are an impermissible and an almost outrageous comment on the  
21 defendant's Fifth Amendment rights.

22 Mr. Menchel was called as a general expert on  
23 broker-dealers. He was not charged with the task of being a  
24 summary witness, of being a conduit for Mr. McLellan's  
25 testimony, or being a conduit for Mr. McLellan's state of

1 mind.

2 He wasn't called to testify about AXA or Royal Mail  
3 or any other transition. He was called as a general expert,  
4 hugely qualified regarding the ordinary and industry  
5 practices of broker-dealers.

6 For Mr. Frank to be asking him do you know what's  
7 in Mr. McLellan's mind, did you speak to Mr. McLellan, it's  
8 just a back-door comment that burdens and is -- impermissibly  
9 burdens Mr. McLellan's Fifth Amendment right.

10 MR. FRANK: That's not remotely what I was  
11 attempting to do, Your Honor. And I have no objection to an  
12 instruction to the jury that he has no obligation to testify  
13 or anything that the court thinks is curative on that front.

14 What I was attempting to establish is that this  
15 witness has no basis for knowing that anything he's testified  
16 to about Rule 10(b)10 is something that's known to the  
17 defendant, and there's no evidence in the record as to that  
18 point.

19 He's testifying about Rule 10(b)10, which is a  
20 back-door way of suggesting that the defendant thought he was  
21 entitled to charge these markups and not disclose them. And  
22 there's nothing in the record and he has no basis for  
23 testifying that that was known to this defendant.

24 MR. WEINBERG: A broker-dealer's knowledge of  
25 10(b)10 is like a criminal lawyer's knowledge that Title 18



1 is the United States Code.

2 THE COURT: Couple of things.

3 I think I am going to say something to the jury. I  
4 think the repeated questions, despite being sustained, about  
5 what discussions happened between Mr. McLellan and the  
6 witness, who said nothing in any way, shape, or form related  
7 to -- that could have been -- that was predicated on a  
8 conversation with Mr. McLellan warrants some sort of curative  
9 instruction. I'll think of exactly how to put it and review  
10 it with you in the morning before I --

11 MR. WEINBERG: I would like Your Honor to consider  
12 including in that instruction that these questions were  
13 impermissible, they were far beyond the scope, and that they  
14 were an unfair burden on Mr. McLellan's constitutional right  
15 to rely on counsel.

16 MR. FRANK: We object to that, Your Honor.

17 THE COURT: I'll consider it. I will think about  
18 it, and whatever I'm thinking about I'll review with you in  
19 the morning.

20 MR. WEINBERG: Thank you, sir.

21 THE COURT: So that resolves that aspect of that  
22 issue. Is there anything else to talk about?

23 MR. GOLDSTEIN: In terms of scheduling, I don't  
24 know how much longer Mr. Frank expects to have for this  
25 witness.

1 MR. FRANK: 30 minutes.

2 THE COURT: Okay.

3 MR. FRANK: Roughly. I'm guesstimating.

4 THE COURT: Right.

5 MR. WEINBERG: Okay.

6 THE COURT: Then --

7 MR. GOLDSTEIN: Mr. Travaglini will be next.

8 THE COURT: How long will he be on direct?

9 MR. GOLDSTEIN: Shorter than Mr. Menchel.

10 THE COURT: And cross would be similar to this  
11 witness or shorter?

12 MR. FRANK: Or shorter. And I have -- I don't know  
13 whether there are any other witnesses after that.

14 THE COURT: That's what I was going to ask.

15 MR. WEINBERG: Either Mr. McLellan's testimony --  
16 we'll resolve that today or tomorrow morning.

17 Sean Murphy is a witness who, like Federal Special  
18 Agent Trombly, would be called to read in defense exhibits  
19 that we will be moving for admission sometime tomorrow. He  
20 has also done a summary that we have provided the government  
21 or should have provided the government --

22 MR. FRANK: There has been none provided, Your  
23 Honor.

24 MR. WEINBERG: It will be provided within five  
25 minutes of the break.

1           -- that deal with his analysis of records that were  
2 marked as defense exhibits.

3           Those are the likely witnesses for tomorrow.

4           MR. FRANK: Your Honor, this is exactly the issue I  
5 raised two weeks ago about these summary exhibits. It's now  
6 1:00 the day before testimony is supposed to be elicited.  
7 There are apparently summary charts of I don't know what that  
8 have been prepared. There is no conceivable way that if  
9 those are summaries of voluminous evidence we can be ready  
10 to --

11           MR. WEINBERG: It's not that voluminous, Judge.  
12 It's -- what happens in State Street is there's daily --

13           THE COURT: This is what I suggest, since in my  
14 general experience it's best to talk about things when  
15 everyone knows what they're talking about rather than before,  
16 all right?

17           I don't know whether this is a summary of 150  
18 million pages of documents or a summary of four pages. And  
19 therefore the scope of what -- I don't know whether it's  
20 something when you read it you actually would object to or  
21 whether you won't. I understand the concern you have and --  
22 but I'm not resolving it in a vacuum. So --

23           MR. WEINBERG: We'll discuss it.

24           THE COURT: -- I think what you should do is you  
25 should -- with respect to Mr. Murphy, it strikes me there's

1 two areas.

2 One is there are documents you're proposing to  
3 admit. To the extent you haven't identified the specific  
4 ones you want, identify them. If there's no dispute, either  
5 they're already in -- if there is no dispute as to their  
6 admission, that seems straightforward enough.

7 If there's a dispute as to admission, then what I  
8 suggest that all of you do is sometime you either ECF file or  
9 otherwise transmit to me those documents that are at least in  
10 dispute so I can read them before we convene in the morning  
11 so that I can hear you about whatever disputes there are as  
12 to the exhibits.

13 And as to the summary, I think you need to turn it  
14 over to him, like, immediately. And then you look at it and  
15 then you see what it is, and if there's an issue, then  
16 provide a copy of it to me as well as to that so I can look  
17 at it and then I'll address it.

18 MR. WEINBERG: Thank you, Your Honor.

19 THE COURT: I just don't know. It could be so many  
20 different things -- I don't know anything about it -- that it  
21 just depends. So I think it's best if you look at it first  
22 and then I'll hear whatever objections people have, if any.

23 MR. WEINBERG: It's something a paralegal can run  
24 through the documents in about an hour and see that the chart  
25 is correct. But I will provide all the information to

1 Mr. Frank as soon as we break.

2 MR. FRANK: So are we no longer calling the British  
3 experts?

4 MR. WEINBERG: Not tomorrow, no.

5 THE COURT: So tomorrow is the rest of this expert,  
6 Mr. Travaglini, Mr. Murphy.

7 Mr. Murphy's testimony, at most, is reading  
8 essentially exhibits that are offered and admitted into  
9 evidence and identifying a summary chart that's admitted into  
10 evidence and describing whatever, how he formed it?

11 MR. WEINBERG: Yes, with the potential for  
12 Mr. McLellan's testimony. That will be tomorrow. And we'll  
13 be making final decisions on whether we're calling in our  
14 case in chief experts three and four as soon as we break.

15 THE COURT: All right. I'll see you all tomorrow  
16 at 8:30. Thank you.

17 COURTROOM CLERK: All rise. This matter is  
18 adjourned.

19 (Court in recess at 1:07 p.m.)  
20  
21  
22  
23  
24  
25

**CERTIFICATE OF OFFICIAL REPORTER**

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Dated this 19th day of June, 2018.

/s/ RACHEL M. LOPEZ

/s/ KELLY A. MORTELLITE

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Rachel M. Lopez, CRR  
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